1995

Arne's America a Utah corporation v. American Consolidated Mining Co., Victoria Mining and Milling Co., Becho Inc., Eames Inv. Co., Alta Excavating, International Minerals and Metals Inc. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ARNE'S AMERICA, a Utah corporation, Plaintiff/Appellee, v. AMERICAN CONSOLIDATED MINING CO., VICTORIA MINING AND MILLING CO., BECHO, INC., EAMES INV. CO., ALTA EXCAVATING, INTER-NATIONAL MINERALS & METALS, INC., Defendants/Appellants.	)	**BRIEF OF APPELLANT** Appellate Case No. 950239-CA Priority No. 15

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
JUDGE TIMOTHY R. HANSON

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JURISDICTION OF APPELLATE COURT

The Utah Supreme Court had jurisdiction over this appeal under Utah Code Ann. § 78-2-2(3)(j) (1992), as a final order of a court of record over which the Utah Court of Appeals did not have original jurisdiction.

On April 5, 1995, the Clerk of the Utah Supreme Court gave notice that this appeal had been transferred to the Utah Court of Appeals. The Utah Supreme Court has discretion to make such transfer under Rule 42, Utah Rules of Appellate Procedure. Thus, the Utah Court of Appeals has jurisdiction to hear this appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court commit reversible error in ruling that the purported oral modification of the Trucking Agreement, which required American Consolidated Mining Co. ["ACMC"] to pay Arne's American, Inc. ["Arne's"] an extra $2.10 per yard for the removal of existing overburden, was enforceable, in view of the failure to find the modification by clear and convincing evidence, and the Statute of Frauds which prohibited the modification of the Trucking Agreement unless agreed to by the parties in writing?

The standard of appellate review for this issue is the standard of correctness, without deference to the trial court's legal determinations. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993).

This was among the ultimate issues ruled on by the trial court in its Memorandum Decision. [R 608-617, App. A.][1]

2. Did the trial court commit reversible error in holding that Arne's is entitled to recover from ACMC, pursuant to the Guaranty Agreement dated December 13, 1985, the $144,270 that was advanced by Arne's to Victoria Milling and Mining Co. ["VMMC"], where the Guaranty Agreement was executed only by VMMC, and not by ACMC?

The standard of appellate review for this issue, which involves the construction and interpretation of written contracts, is the standard of correctness, without deference to the trial court's legal determinations. Saunders v. Sharp, 806 P.2d 198 (Utah 1991).

This was among the ultimate issues ruled on by the trial court in its Memorandum Decision. [R 608-617, App. A.]

3. Did the trial court commit reversible error in ruling that the Guaranty Agreement dated December 13, 1985, released Arne's from its contractual obligation to invest $2,000,000 in the mining venture, in light of the following:

a. The indemnification by VMMC of Arne's obligation to invest $2,000,000 in the project did not constitute a release of Arne's obligation to ACMC to invest that sum in the project;

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[1] Citations to the Record are denoted "R" followed by the page numbers. Citations to the transcript are denoted "TR" followed by the trial date and page number. Citations to trial exhibits are denoted "Ex." followed by the exhibit number. Documents that are also attached for the Court's convenience in the Appendix are denoted "App." followed by the letter of the Appendix in which the document is found.

b. ACMC was not a party to the Guaranty Agreement, and the plain language of the Guaranty Agreement expressly provided that only VMMC, and not ACMC, would indemnify Arne's from the $2,000,000 obligation;

c. Arne's signed an agreement with ACMC and VMMC on January 2, 1986, subsequent to the execution of the Guaranty Agreement by VMMC on December 13, 1985, which reaffirmed or reinstituted Arne's obligation to invest the $2,000,000 into the project.

The standard of appellate review for this issue is the standard of correctness, without deference to the trial court's legal determinations. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993).

This was among the ultimate issues ruled on by the trial court in its Memorandum Decision. [R 608-617, App. A.]

4. Did the trial court commit reversible error in granting an additional money judgment in favor of Arne's and against ACMC in an amount equal to the judgment obtained by Becho, Inc. against Arne's for work done by Becho as a subcontractor of Arne's?

The standard of review for this issue is the standard of correctness, without deference to the trial court's legal determinations. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993).

This was among the ultimate issues ruled on by the trial court in its Memorandum Decision. [R 608-617, App. A.]

5. Did the trial court commit reversible error when it ruled that Arne's mechanics' liens on the mining claims of ACMC were valid and could be foreclosed, in view of the following:

a. Arne's overstated the value of its legitimate claims by including in the amount of the liens (i) the $144,270 that was advanced to extend the time for exercising the option to purchase the Victoria Mill, (ii) the additional overburden charges that were not owed by ACMC under the Trucking Agreement, and (iii) interest at the unconscionable rate of 2½% per day; and

b. Arne's failed to separately state in its amended notice of claim the lien amounts that were applicable to each individual mining claim.

The standard of review for this issue is the standard of correctness, without deference to the trial court's legal determinations. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993).

This was among the ultimate issues ruled on by the trial court in its Memorandum Decision. [R 608-617, App. A.]

DETERMINATIVE STATUTES

STATUTE OF FRAUDS
Utah Code Ann. § 25-5-4(1) (1994)

§ 25-5-4. Certain agreements void unless written and signed.

> The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(1) every agreement that by its terms is not to be performed within one year from the making of the agreement;

MECHANICS' LIEN STATUTE

Utah Code Ann. § 38-1-3 (1994)

§ 38-1-3. Those entitled to lien--What may be attached.

Contractors, subcontractors and all persons performing any services or furnishing any materials used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner; all persons who shall do work or furnish materials for the prospecting, development, preservation or working of any mining claim, mine, quarry, oil or gas well, or deposit; and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished materials, for the value of the service rendered, labor performed or materials furnished by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise. Such liens shall attach only to such interest as the owner may have in the property, but the interest of a lessee of a mining claim, mine or deposit, whether working under bond or otherwise, shall for the purposes of this chapter include products mined and excavated while the same remain upon the premises included within the lease.

Utah Code Ann. § 38-1-8 (1994)

§ 38-1-8. Liens on several separate properties in one claim.

Liens against two or more buildings, mining claims or other improvements owned by the same person or persons may be included in one claim; but in such case the person filing the claim must designate therein the amount claimed to be due to him on each of such buildings, mining claims or other improvements.

STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS

On December 19, 1986, Arne's American Inc. ["Arne's"] commenced this action against American Consolidated Mining Co. ["ACMC"] and Victoria Mining and Milling Co. ["VMMC"], alleging claims for breach of contract, foreclosure of mechanics' liens filed on mining claims, and unjust enrichment. [R 2-25.] Other entities which Arne's believed might claim an interest in the mining claims were named as Defendants, as well, in connection with the mechanics' lien foreclosure claim. Defendants ACMC and VMMC [hereinafter collectively referred to as "Defendants"] filed a counterclaim against Arne's, alleging breach of contract. [R 86-94.] The claims asserted in the litigation arose out of a series of written agreements between the parties relating to a mining venture in which they were involved. When the mining venture ultimately failed, this action followed.

A bench trial was held on August 30-31, 1993, September 1-2, 1993, November 22, 1993, and February 28, 1994. Thereafter, on November 15, 1994, the Court issued a Memorandum Decision finding that Defendants were liable to Arne's for breach of contract; that Arne's was entitled to recover damages from Defendants; and that Arne's also was entitled to foreclose on its mechanics' liens. [R 608-617, App. A.] The Court dismissed Defendants' counterclaim. [R 613, App. A.] On December 8, 1994, the Court entered its Findings of Fact and Conclusions of Law and a Judgment in favor of Arne's and against Defendants. [R 628-642, App. B.] The total Judgment, including pre-judgment interest and attorneys' fees, is

in excess of $1,500,000.00. [R 639-642, App. B.] This Appeal was timely filed on January 9, 1995. [R 690-691.]

STATEMENT OF MATERIAL FACTS

ACMC is a publicly held Utah corporation which owns or holds certain mining claims in Tooele County, Utah. [R 629.] ACMC, along with one Winslow Cady, formed VMMC, a Nevada corporation, as an operating company to mine the claims held by ACMC. [TR 11/22/93, pp. 8-10.] On July 29, 1985, ACMC granted VMMC the exclusive right to mine those claims. [Ex. 42.] At that same time, Cady agreed with VMMC to provide $250,000 as operating capital for the mining operation, and approximately $2,000,000 to be used to exercise VMMC's option to purchase an ore processing mill, known as the Victoria Mill, from its owner, Hecla Mining Co. ["Hecla"]. [Ex. 43.]

In July of 1985, Arne's submitted a written proposal to ACMC for Arne's to establish and operate an open pit mine on ACMC's mining claims, remove existing overburden, crush the ore, and transport the ore to the Victoria Mill for processing. [Ex. 44.] On August 1, 1985, ACMC accepted Arne's proposal. [Ex. 44.]

The parties formalized their agreement by entering into a written contract dated September 1, 1985, which became known as the "Trucking Agreement." [Ex. 1, App. C.] The Trucking Agreement provided that Arne's would operate a mining operation at the Yellow Hammer Mine near Gold Hill, Utah, remove existing overburden to nearby areas clear of the mining operation, crush the ore to a

maximum of 8 inches, and transport the ore to the Victoria Mill [hereinafter collectively referred to as the "mining and hauling services"]. [Ex. 1 at 1 and 3, ¶4, App. C.] The Trucking Agreement further provided that, as compensation for Arne's mining and hauling services, Arne's would be paid $10.25 per ton of ore delivered to the mill site. [Ex. 1 at 3-4, ¶5.] It also provided that Arne's would be paid a bonus of $1.00 per ton of ore delivered to the mill site, so long as VMMC had a continual supply of at least 1,000 tons of ore available at the mill site without interruption. [Ex. 1 at 6, ¶7.]

One week later, on September 8, 1985, the parties entered into another written contract ["the Sept. 8 Agreement"], whereby a joint venture was created among the parties, and Arne's was given complete responsibility for and control of the Victoria Mine, subject only to ACMC's retention of general operational authority and control. In return for such services, Arne's acquired from ACMC and VMMC a 5% interest in VMMC. [Ex. 2, App. D.] In addition, the parties agreed to increase the compensation to be paid to Arne's under the Trucking Agreement for its mining and hauling services from $10.25 to $12.25 per ton of ore delivered to the Victoria Mill, while at the same time eliminating the $1.00 per ton bonus payment called for in the Trucking Agreement. [Ex. 2, App. D.]

Under the Sept. 8 Agreement, Arne's also agreed that if, for any reason other than the quality of the ore being mined, the company's profits by November 1, 1985, were insufficient to

complete the purchase of the Victoria Mill, Arne's would invest $2,000,000 in VMMC to enable VMMC to consummate the purchase of the mill. Upon investing the $2,000,000, Arne's would receive from Cady an additional 10% of the company's stock. [Ex. 2, App. D.]

On October 11, 1985, the parties entered into a new written agreement [the "Oct. 11 Agreement"], whereby they formalized the formation of the joint venture which they had agreed to in the Sept. 8 Agreement. [Ex. 4, App. E.] The Oct. 11 Agreement, which expressly superseded and replaced all prior agreements between the parties except the Trucking Agreement, reaffirmed Arne's obligation to invest $2,000,000 in the company so that VMMC could complete the purchase of the Victoria Mill. [Ex. 4, ¶8(b).]

On October 14, 1985, the parties entered into three separate written agreements, each of which increased Arne's ownership interest in VMMC. In one agreement ["the Oct. 14 Payroll Funding Agreement"], Arne's agreed to provide $32,000 to VMMC to cover payroll and other operating expenses in exchange for an additional 6% of the company's stock and profits. [Ex. 5.] In a second agreement ["the Oct. 14 Payment Forgiveness Agreement"], it was agreed that if, by October 15, 1985, Arne's was not paid $150,000 for mining and hauling services previously provided by it, Arne's would forego its right to such payment, and be given an additional 6% interest in VMMC. [Exs. 7, 18.] A third agreement ["the Raising Funds Agreement"], provided that in exchange for Arne's best efforts in attempting to obtain $150,000 to be used as operating capital for the project, Arne's would receive an

additional 6% of the stock in VMMC, at such time as the funds were received. [Exs. 8, 11.] All of the October 14 Agreements provided that Arne's would share net profits according to its ownership interest in VMMC. [Exs. 5, 7, 8, 11, 18;[2] TR (8/30/93) 29:6-31:13, 32:16-35-3, 70:8-17.]

During October, 1985, Arne's requested that Defendants agree to pay Arne's an additional amount for moving existing overburden which Arne's considered excessive. Arne's contended that an oral agreement was reached whereby Defendants agreed to pay for the removal of the overburden at the rate of $2.10 per ton. [TR (8/30/93) 35:4-36:15.] Defendants acknowledged that there had been discussions regarding that issue, but testified that an agreement to pay additional amounts for overburden removal, beyond what they already were obligated to pay, never was reached. [TR (2/28/94) 33:24-34:15.] Arne's prepared a written contract which would have obligated Defendants to pay the additional amounts for overburden removal, but Defendants refused to sign that document. No written agreement obligating Defendants to pay extra for removal of overburden ever was signed by the parties. [TR (8/30/93) 36:8-14, 67:12-21; (2/28/94) 33:17-23.]

On November 5, 1985, Arne's entered into a written agreement with Cady, whereby Arne's obtained Cady's remaining interest in VMMC. Through this agreement, Arne's ownership interest in VMMC increased to 52½%. [Ex. 20.]

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[2] Exhibit 11 is the same document as Exhibit 7, and Exhibit 18 is the same document as Exhibit 8, except for some handwritten notes which appear on Exhibits 11 and 18. [TR (8/30/93) 34:5-22, 70:8-17.]

In November, 1985, the parties desired to consolidate many of their prior agreements into a single contract. An Agreement was drafted, which indicated in its preamble that it was "made and entered into as of November 11, 1985" ["the Nov. 11 Draft Agreement. [Ex. 12.] The Nov. 11 Draft Agreement again acknowledged the joint venture relationship between Arne's, James Sullivan (Arne's president), ACMC, and VMMC. It also restated Arne's and Sullivan's obligation to provide $2,000,000 to purchase the Victoria Mill if such funds otherwise were unavailable by December 1, 1985. [Ex. 12, ¶9(b).] Although the parties reviewed and made changes to the Nov. 11 Draft Agreement, it was not finalized or executed at that time. [TR (8/30/93) 37:9-39:17.]

On October 13, 1985, VMMC entered into an Extension of Option Agreement with Hecla, whereby upon the payment of certain monies, the date for exercising the option to purchase the Victoria Mill was extended to December 13, 1985. [See Ex. 12 at 1, ¶A.] As the December 13 date approached, the parties did not have the $2,000,000 that was necessary to purchase the mill. At that time, Hecla agreed to extend the time for exercising the option to purchase the mill to January 31, 1986, if VMMC paid Hecla an additional $144,270 by December 13, 1985. [Ex. 14; TR (8/30/93) 47:1-15.]

On December 12, 1985, Arne's entered into a written agreement with Defendants ["the Dec. 12 Agreement"], whereby Arne's agreed to provide the $144,270 that was needed to obtain the extension of

time for exercising the option agreement, in exchange for an additional 7½% ownership interest in VMMC. [Ex. 14, App. G.]

During the afternoon of December 13, 1985, shortly before the $144,270 payment to Hecla was due, Sullivan presented William Moeller, VMMC's president, with a Guaranty Agreement, which Sullivan wanted Moeller to sign. [TR (8/30/93) 48:3-44:5.] The Guaranty Agreement provided that if VMMC was unable to repay to Hecla within 30 days, the guarantor would personally guaranty the repayment himself. [Ex. 15, App. H.] Sullivan indicated that if the Guaranty Agreement was not signed, Arne's would not make the $144,270 payment to Hecla. [TR (8/30/93) 49:6-9; (2/28/94) 49:17-22.]

Moeller refused to sign the Personal Guaranty in his individual capacity, but agreed to sign it on behalf of VMMC. That was acceptable to Sullivan. Sullivan added the words "President, VMMC" under the signature line and initialed that hand-written addition. Sullivan also added and initialed another hand-written addition to the body of the agreement, which stated as follows: "Guarantor also agrees to indemnify Arne's from its commitment to provide up to $2,000,000 for the purchase of the mill assets as provided in previous agreements. Additionally first proceeds from the sale of any products of ~~Victoria~~ VMMC shall be committed to repayment of this advance." [TR (8/30/93) 83:2-84:18; (2/28/94) 50:6-23); Ex. 15, App. H.] After the additions to the document had been made by Sullivan, Moeller signed the Guaranty Agreement on behalf of VMMC. [TR (2/28/94) 50:6-23; Ex. 15, App. H.] Once the

Guaranty Agreement had been signed, Arne's transferred the $144,270 to Hecla, thereby extending the time to exercise the option to purchase the mill to January 31, 1986. [TR (8/30/93) 51:6-10.]

Although the extension of time had been obtained, VMMC was out of money, and by the middle of December, the mill had been shut down and no mining or milling activities were taking place. [TR (2/28/94) 38:24-39:5; (8/31/93) 86:16-87:5.] In late December, 1985, Sullivan came to Moeller, and indicated that Arne's wanted to continue with the project. At that time, Sullivan called VMMC's attorney in Ohio, told him that Arne's wanted to go forward with the project, and asked him to make the revisions that had been written on the Nov. 11 Draft Agreement, and to send the revised agreement ["Revised Nov. 11 Agreement"] to him. [TR (2/28/94) 53:11-55:3.] On January 2, 1986, the attorney sent the Revised Nov. 11 Agreement to Sullivan. [Exs. 13 and 19, Apps. F. and I.]

Shortly after the Revised Nov. 11 Agreement was received, Sullivan signed the contract on behalf of Arne's and himself individually, and forwarded the agreement to Moeller. [TR (8/30/93) 79:9-19.] Moeller signed the contract on behalf of ACMC and VMMC on or about January 12, 1986. [TR (2/28/94) 44:12-21; Ex. 13, App. F.]

The Revised Nov. 11 Agreement expressly superseded the July 29 Agreement between VMMC and Cady, the Sept. 8 Agreement, and the Oct. 11 Agreement, but it incorporated most of the terms from those agreements in it. In particular, the Revised Nov. 11 Agreement restated Arne's and Sullivan's obligation to provide the $2,000,000

that was necessary to purchase the Victoria Mill. [Ex. 13, App. F.]

Arne's and Sullivan failed to provide the $2,000,000 that they had agreed to provide in the Revised Nov. 11 Agreement, and VMMC was unable to exercise its option to purchase the Victoria Mill by the January 31, 1986 deadline. Other efforts to obtain funding also were unsuccessful. [TR (2/28/94) 57:7-10.]

On March 5, 1986, Moeller notified Sullivan that ACMC and VMMC considered Arne's and Sullivan to be in default under the Revised Nov. 11 Agreement by reason of their failure to provide the $2,000,000 as agreed. [Ex. 26.]

Between October, 1985, and March, 1986, Arne's had submitted invoices for amounts which it claimed were owed pursuant to the Trucking Agreement. Those invoices were addressed and submitted to VMMC and not to ACMC. [Exs. 21-23, App. K; TR (8/30/94) 61:6-62:6.] Those invoices contained charges not only for mining and hauling services, but also additional amounts for removal of overburden, and for fuel, parts and other miscellaneous expenses. [Exs. 21-23, App. K.] Some payments were made to Arne's by VMMC, and some credits and offsets were applied against the invoices by Arne's. [Ex. 31, App. L.]

On March 10, 1986, Arne's recorded a Notice of Lien on ACMC's Herat Mining Claim in the amount of $20,000. [Ex. 16.] On March 21, 1986, Arne's recorded an Amended Notice of Lien on ACMC's Centennial, Cosmopolitan, Copperapolis, and Yellow Hammer mining claims in the amount of $883,679.41. [Ex. 17, App. J.] The amount

of the amended notice of lien included not only the amounts owed for mining and hauling services, but also for the extra overburden removal charges, interest at 2½% per day, and the $144,270 advanced by Arne's to VMMC in December, 1985. [TR (8/31/93) 4:17-18:13.]

This action was commenced on December 19, 1986.

SUMMARY OF ARGUMENT

The trial court erred as a matter of law in holding that a purported oral modification of the Trucking Agreement, to provide additional compensation to Arne's from removal of existing overburden, was enforceable against Defendants. The written Trucking Agreement clearly required that the overburden be removed by Arne's as a part of its mining and hauling duties under the contract. Payment for such services, including the removal of overburden, was set forth in the Trucking Agreement.

The Trucking Agreement contained an integration clause which prohibited the modification of any terms of the contract unless the modification was made in writing and signed by the parties. More importantly, where the Trucking Agreement was to continue for not less than twenty-four months, the Statute of Frauds required that contract, as well as any modifications thereto, to be in writing.

The purported oral modification was not properly excluded from the coverage of the statute of frauds on the grounds of part performance. The removal of overburden was within the scope of work required by Arne's under the Trucking Agreement, and therefore

the performance of that work could not serve as part performance of any oral modification of the Trucking Agreement.

The claimed oral modification also was not enforceable on the ground of acknowledgement and payment. All invoices requesting separate payment for overburden removal were given to VMMC and not to ACMC, and those invoices were neither approved or paid by ACMC.

The trial court also erred as a matter of law in holding that ACMC was responsible to repay the $144,270 that was advanced by Arne's to VMMC on December 13, 1985. The Dec. 12 Agreement did not create any obligation of repayment at all. The Guaranty Agreement dated December 13, 1985, which the trial court ruled gave rise to the obligation of repayment, was not signed by ACMC. Thus, ACMC had no responsibility to repay the $144,270 to Arne's.

A further error of the trial court was its holding that Arne's was excused from its contractual obligation to invest $2,000,000 in the mining venture. The trial court ruled that the indemnification provision in the Guaranty Agreement released Arne's from its investment obligation. The plain language of the indemnification provision only indemnified Arne's from the obligation; it did not release Arne's from its agreement to provide $2,000,000 to the project.

Further, the Guaranty Agreement containing the indemnification provision was not executed by ACMC. While the indemnification provision was binding on VMMC, it was not binding on ACMC.

In January, 1986, after the Guaranty Agreement which purportedly released Arne's from its investment obligation was

executed, the parties executed the Revised Nov. 11 Agreement which restated Arne's obligation to provide the $2,000,000 funding for the project.

Finally, there was no consideration for the purported release.

The trial court also erred in granting an additional money judgment against Defendants based upon the judgment entered against Arne's in favor of Becho, Inc., one of Arne's subcontractors. Arne's was not entitled to any additional compensation from Defendants based on Becho's services for Arne's. Becho simply assisted Arne's in performing the mining and hauling services that Arne's was obligated to do, and for which it was to be compensated, under the Trucking Agreement.

The trial court also erred in holding that the mechanics' liens filed by Arne's against ACMC's mining claims were proper and could be foreclosed. The mechanics' liens also were improper because they overstated the proper lien amount, and the included non-lienable items. Moreover, the liens failed to specify the amount due for services on each separate mining claim. Instead, Arne's imposed a blanket lien against all of the mining claims in the total amount of all amounts purportedly owed.

The legal errors made by the trial court warrant the reversal of the judgment against Defendants, and the granting of judgment in their favor.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE PARTIES ENTERED INTO AN ENFORCEABLE ORAL MODIFICATION OF THE WRITTEN TRUCKING AGREEMENT, WHICH REQUIRED ACMC AND AND VMMC TO PAY ADDITIONAL CHARGES TO ARNE'S FOR OVERBURDEN REMOVAL SERVICES

Under the terms of the Trucking Agreement dated September 1, 1985, Arne's was obligated to conduct a mining operation at the Yellow Hammer Mine, remove existing overburden to nearby areas clear of the mining operation, crush the ore to a maximum of 8 inches, and transport the ore to the Victoria Mill. [Ex. 1 at 1, App. C. (emphasis added).] Arne's initially agreed to be compensated for such mining and hauling services at the rate of $10.25 per ton of ore delivered to the mill site. [Ex. 1 at 3-4, ¶5.] That rate was increased to $12.25 per ton pursuant to the Oct. 11 Agreement between the parties.

The trial court ruled that the parties subsequently modified the Trucking Agreement to require Defendants to pay Arne's an additional $2.10 per yard, beyond what it already was obligated to pay pursuant to the Trucking Agreement, for overburden removal. [R 608, App. A.] The trial court found that this oral modification of the Trucking Agreement was enforceable based on "testimony, part performance, acknowledgment and payment, along with limited writings." [R 608, App. A.]

A. The Trial Court's Finding That the Parties Orally Agreed To Modify The Trucking Agreement Was Not Based On Clear And Convincing Evidence, And Therefore Was Erroneous As A Matter Of Law.

The Trucking Agreement contains an integration clause which expressly precludes any amendment of or modification to the terms of the Trucking Agreement unless the amendment or modification is executed in writing by the parties. [Ex. 1, ¶18, App. C.] Arne's acknowledged at trial, and the evidence conclusively established, that no written document ever was signed by the parties which reflected an agreement to pay any amount for overburden removal other than what was called for in the Trucking Agreement. [TR (8/30/93) 36:8-14, 67:12-21; (2/28/94) 33:17-34:15.]

Except where a change to or modification of a contract conflicts with a well-recognized rule of law (see subsection B below), parties to a written contract may change or modify the contract or make new terms, even if the contract itself contains a provision to the contrary. Provo City Corp. v. Nielsen Scott Co., 603 P.2d 803, 806 (Utah 1979). However, in cases where an oral modification of a written agreement is permissible, the oral modification must be established by clear and convincing evidence. Bouton Construction Co. v. M&L Land Co., 877 P.2d 928, 936 (Idaho App. 1994); Wolin v. Walker, 830 P.2d 429, 432 (Wyo. 1992); Creekmore v. Redman Industries, Inc., 671 P.2d 73, 79 (Okl.App. 1983).

There was conflicting evidence presented at trial regarding whether the payment of an additional fee for overburden removal had been orally agreed to by the parties at all. Arne's presented

testimony of such an oral agreement. Defendants disputed that testimony, however. William Moeller, the chairman of ACMC and president of VMMC, testified that the issue had been discussed, but that the parties could not reach agreement. [TR (2/28/94) 33:24-34:15.] The testimony presented by both parties further established that Arne's had prepared a written contract which would have obligated Defendants to pay an additional sum for overburden removal, but Defendants refused to sign the contract. Defendants contend that they were unwilling to do so because no agreement had been reached. [See TR (8/30/93) 36:8-14, 67:16-21; (2/28/94) 33:17-34:15.]

In finding the existence of an oral modification of the Trucking Agreement, the trial court stated as follows:

> The Court is further satisfied and finds that the plaintiff's evidence is most persuasive on the issue of plaintiff's claims of payment for overburden. The Court finds that there was an agreement to pay for hauling overburden at $2.10 per yard. The Court finds sufficient evidence, both through testimony, part performance, acknowledgment and payment, along with limited writings, all as asserted by the plaintiff, to support a modification of the Trucking Agreement and obligate the defendants for the costs of moving the overburden.

[R 610, App. A. (emphasis added).]

In finding that Arne's evidence was "most persuasive" on the oral modification issue, and that there was "sufficient evidence" to support a modification of the Trucking Agreement, the trial court apparently utilized a preponderance of the evidence standard in finding that the parties had orally modified the written contract. Nowhere in its decision does the trial court indicate that Arne's proved the existence of the oral modification by clear

and convincing evidence. In failing to use the proper standard of proof, the trial court committed reversible error. Accordingly, the judgment, as it relates to Arne's claim for amounts owed for overburden removal services, should be reversed.

B. Under The Statute Of Frauds, Any Modification Of The Trucking Agreement Was Required To Be In Writing.

The long standing rule in Utah is that where the Statute of Frauds requires the original contract to be in writing, all subsequent modifications to that contract also must be in writing. Wilson v. Gardner, 348 P.2d 931, 933 (Utah 1960); Bamberger Co. v. Certified Productions, 48 P.2d 489, 491 (Utah 1935).

Section 4(1) of the Statute of Frauds, Utah Code Ann. §25-5-4(1) (1995), provides:

> The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:
>
> > (1) every agreement that by its terms is not to be performed within one year from the making of the agreement.

The Trucking Agreement was required to be in writing pursuant to the Statute of Frauds, because, by its terms, the Trucking Agreement could not be performed in less than one year. Paragraph 2 of the Trucking Agreement expressly provides:

> This agreement shall be binding on the parties hereto, for a continuous period of not less than twenty-four (24) months and shall thereafter remain binding for the life of the mining operations as stated in the Notice of Intent.

[Ex. 1 at 2, ¶2, App. C.]

Since the duration of the Trucking Agreement was to last not less than twenty-four months, that contract was required by the Statute of Frauds to be in writing. That agreement had to be in writing, and any modification thereto similarly had to be in writing and signed by the parties. Wilson, 348 P.2d at 933; Bamberger Co., 48 P.2d at 491. It should be noted that other modifications, such as the increase in payment for mining and delivery of ore from $10.25 to $12.25 were included in subsequent written contracts while the purported payment for overburden removal was not.

Under Utah law, the parties could not orally modify the terms of the Trucking Agreement to require Defendants to pay an additional amount for overburden removal. Thus, the trial court's ruling to the contrary constitutes reversible error.[3]

C. **The Trial Court's Reliance On The Doctrine Of Part Performance To Enforce The Purported Oral Modification Of The Trucking Agreement Is Erroneous As A Matter Of Law Where Arne's Was Already Obligated To Remove The Overburden.**

The trial court similarly erred in relying on the doctrine of part performance to exclude the oral modification of the Trucking Agreement from the requirements of the Statute of Frauds.

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[3] The trial court's decision to enforce the purported oral modification of the Trucking Agreement is puzzling in light of a ruling made at trial which reflected the court's understanding of the purpose and legal effect of the integration clause. James Sullivan, Arne's president, was asked by Arne's counsel if, in view of the integration clause, it was his understanding that everything [i.e. every agreement between the parties] had to be in writing. The trial court sustained an objection to that question on the ground that Sullivan's understanding was irrelevant given the integration clause's requirement that any modification of the contract must be in writing and signed by the parties. [TR (8/31/93) 34:6-41:24.]

Although Arne's clearly did remove overburden, such work cannot be considered part performance of the purported oral modification of the Trucking Agreement because Arne's was already obligated to perform that work. Under the terms of the Trucking Agreement, Arne's was being paid $12.25 per ton of ore delivered to the mill. That amount was to compensate Arne's not merely for hauling the ore, but also for removing the overburden, as well as mining the ore and crushing it to the required size. [Ex. 1 at 1, App. C.] The Trucking Agreement expressly provided that "Arne's shall remove the trees, bushes, topsoil, subsoil and overburden using the methods set forth in the Notice of Intent, and shall stockpile the topsoil, subsoil and overburden as therein set forth." [Ex. 1 at 3, ¶4, App. C.]

Thus, removal of overburden by Arne's was nothing more than performance of its original obligations under the Trucking Agreement. In return for such services, Arne's was entitled to be compensated at the rate agreed by the parties in writing, and not pursuant to the alleged oral modification.

D. <u>The Payment Of Invoices By VMMC Provides No Justification For Enforcing The Purported Oral Modification Of The Trucking Agreement Against ACMC</u>.

The trial court's reliance on the alleged payment of invoices reflecting charges for overburden removal as a basis for disregarding the integration clause, and enforcing the purported oral modification, is misplaced.

The only invoices generated by Arne's which included charges for overburden removal were invoices 10346, 10349, 10358, and

10361. [Exs. 21-23, App. I.] No cash payment was made for any of those invoices. Invoices 10346 and 10349 were satisfied by giving Arne's an additional 6% interest in VMMC, pursuant to one of the October 14, 1985 agreements. [Exs. 11, 31.] Invoices 10358 and 10361 remain unpaid. [Ex. 31, App. L.] Clearly, ACMC has not paid any of the invoices.

Moreover, the evidence established that Arne's invoices, including those asserting charges for overburden removal, always were addressed and sent to VMMC, and not ACMC. [Exs. 21-23, App. K.] Arne's president admitted that no invoices ever were submitted by Arne's to ACMC. [TR (8/30/93) 61:6-62:6.] ACMC did not review the invoices, approve them for payment, or see that they were paid. [TR (2/28/94) 92:25-93:13.]

None of the legal doctrines relied upon by the trial court support an oral modification of the Trucking Agreement to require ACMC to pay additional compensation to Arne's for overburden removal. The trial court's enforcement of the purported oral modification was contrary to law, and this Court should reverse the judgment entered against ACMC for the amounts billed by Arne's for overburden removal.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT ACMC WAS OBLIGATED TO REPAY THE $144,270 ADVANCED BY ARNE'S TO VMMC WHERE ACMC WAS NOT A PARTY TO THE GUARANTY AGREEMENT

The trial court also committed reversible error when it held that ACMC was responsible to repay the $144,270 that was advanced

by Arne's to obtain the extension of time to purchase the Victoria Mill.

In October, 1985, VMMC obtained from Hecla Mining Co. an extension of time, to the close of business on December 13, 1985, to exercise its option to purchase the Victoria Mine. As that date approached, neither VMMC nor Arne's had been able to raise the $2,000,000 that was needed to purchase the mill. Shortly before the deadline, Hecla agreed to again extend the time to exercise the option, this time to January 31, 1986, if the sum of $144,270 was paid to Hecla by December 13, 1985.

On December 12, 1985, Arne's agreed to provide the $144,270 that was needed for the extension of time in exchange for an additional 7½% ownership interest in VMMC. The parties entered into a written agreement that day, which reflected the terms of their arrangement. [Ex. 14, App. G.] Pursuant to the clear terms of the Dec. 12 Agreement, neither ACMC nor VMMC was obligated to repay to Arne's the money being advanced by it to secure the extension of time. That contract contained no repayment terms or obligations whatsoever. As was stated in the contract, Arne's consideration for the $144,270 being advanced was the additional 7½% interest in VMMC. [Ex. 14, App. G.][4]

On December 13, 1985, shortly before the deadline for paying the $144,270 to Hecla was to expire, Arne's president, James

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[4] James Sullivan, Arne's president, admitted at trial that, at the time the Dec. 12 Agreement was executed, Arne's understood that the advance of the $144,270 was to be an investment, and that there was no requirement for repayment. [TR (8/31/93) 46:22-47:6.]

Sullivan, demanded that William Moeller sign a Guaranty Agreement which Sullivan had prepared. The Guaranty Agreement provided that if VMMC was unable to repay to Arne's the $144,270 within 30 days, the guarantor would personally guaranty the repayment himself. [Ex. 15, App. H.] Sullivan indicated to Moeller that if the Guaranty Agreement was not signed, Arne's would not make the $144,270 payment to Hecla. [TR (2/28/94) 49:17-22.]

Moeller refused to sign the Personal Guaranty in his individual capacity, but agreed to sign it on behalf of VMMC. That was acceptable to Sullivan. Sullivan added the words "President, VMMC" under the signature line and initialed that hand-written addition. After the additions to the document had been made by Sullivan, Moeller signed the Guaranty Agreement on behalf of VMMC. [TR (8/30/93) 83:2-84:18; (2/28/94) 50:6-23; Ex. 15, App. H.] Once the Guaranty Agreement was signed, Arne's transferred the $144,270 to Hecla. [TR (8/30/93) 51:6-10.]

The trial court determined that the advance of the $144,270 by Arne's was a loan and not an investment. [R 611, App. A.] Although that issue was in dispute at trial, ACMC is not challenging that ruling on appeal. The Dec. 12 Agreement clearly establishes that the advance was to be in exchange for an additional interest in VMMC, and therefore an investment [Ex. 14, App. G.], but there is repayment language in the Guaranty Agreement which would support the trial court's ruling that the advance was a loan. [Ex. 15, App. H.]

However, the trial court committed reversible error in holding that ACMC is liable to Arne's for the repayment of the $144,270. ACMC only signed the Dec. 12 Agreement, and that contract did not obligate ACMC to repay the $144,270 to Arne's. [Ex. 14, App. G.] While the Guaranty Agreement executed on December 13 did create an obligation to repay the $144,270, that was the obligation of VMMC, not ACMC. ACMC did not execute the Guaranty Agreement, and therefore had no obligation to repay the loan created thereby.[5]

The trial court erred in its construction and interpretation of the Dec. 12 Agreement and the Guaranty Agreement. Under Utah law, a guaranty must be strictly construed. Carrier Brokers, Inc. v. Spanish Trail, 751 P.2d 258, 261 (Utah App. 1988); Valley Bank & Trust Co. v. Riteway Concrete Forming, Inc., 742 P.2d 105, 110 (Utah App. 1987). A guaranty also cannot be expanded beyond the fair import of its terms. Carrier Brokers, Inc. v. Spanish Trail, 751 P.2d 258, 261 (Utah App. 1988); George E. Failing Co. v. Cardwell Inv. Co., 376 P.2d 892, 897 (Kan. 1962). The trial court's holding that ACMC is liable to repay the $144,270 that VMMC agreed to repay when it signed the Guaranty Agreement certainly expands the guaranty beyond its terms to encompass an entity that did not sign the agreement. Such a holding constitutes an erroneous conclusion of law.

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[5] ACMC obviously is not liable for VMMC's obligations. VMMC and ACMC are separate and distinct corporate entities. [R 629, ¶¶ 2-3.] ACMC cannot be held liable for VMMC's debts simply because it is a shareholder of VMMC. Moreover, at the time the $144,270 was advanced by Arne's, Arne's had a greater ownership interest in VMMC than ACMC.

Interpretation and construction of written agreements, unless ambiguous, are reviewed by appellate courts under the correction of error standard. See Saunders v. Sharp, 806 P.2d 198 (Utah 1991). In this case, there was no finding or ruling that the documents relating to the $144,270.00 advance were ambiguous. Thus, no deference is given to the trial court's construction or interpretation. It is therefore the role of this Court to review the Dec. 12 Agreement and the Guaranty Agreement and reach its own determination as to their legal effect. Given the clear language of those documents, this Court should hold that ACMC was not obligated to repay the $144,270 advance.

POINT III

ARNE'S WAS NEVER RELEASED FROM ITS OBLIGATION TO ACMC TO PROVIDE $2,000,000 TO PURCHASE THE VICTORIA MILL

Within a week after the Trucking Agreement was signed, Defendants and Arne's entered into a new agreement to form a joint venture. Pursuant to the Sept. 8 Agreement [Ex. 2, App. D.], Arne's was required to invest, if necessary, $2,000,000 in the mining venture so that the option to purchase the Victoria Mill could be exercised. This obligation to invest $2,000,000 was preserved and restated in the Oct. 11 Agreement. [Ex. 4, App. E.] This obligation was in place on December 13, 1985, the date the Guaranty Agreement was signed. [TR (8/30/93) 85:21-25.]

At the time Sullivan presented the Guaranty Agreement to Moeller to sign on December 13, 1985, Sullivan inserted not only the words "President, VMMC" under the signature line, but also the following additional language in the body of the guaranty:

"Guarantor also agrees to indemnify Arne's from its commitment to provide up to $2,000,000 for the purchase of the mill assets as provide in previous agreements." [Ex. 15, App. H.] Following the insertion and initialing of the hand-written additions, Moeller signed the Guaranty Agreement on behalf of VMMC. [TR (2/28/94) 50:6-23.]

The trial court relied on the foregoing handwritten indemnification provision in the Guaranty Agreement in holding that Arne's was totally relieved from its contractual obligation to invest $2,000,000, and that its failure to invest $2,000,000 to purchase the Victoria Mill was not a breach of contract. [R 611, App. A.] However, that provision was insufficient to effect such release as a matter of law.

A. <u>The Plain Language Of The Guaranty Agreement's Indemnification Provision Cannot Be Reasonably Construed As A Release Of Arne's Obligation To Invest $2,000,000</u>.

The indemnification provision in the Guaranty Agreement did not state that Arne's was released from its investment obligation, but merely provided that the guarantor, VMMC, would indemnify Arne's from such obligation. The term "indemnify" is defined as follows:

> To restore the victim of a loss, in whole or in part, by payment, repair or replacement. To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. To make good; to compensate; ....

<u>Black's Law Dictionary</u>, 692 (5th Ed. 1979).

In interpreting the meaning and legal effect of the indemnification provision, the trial court was required to first

look to the four corners of the document itself. Wade v. Stangl, 869 P.2d 9, 12 (Utah App. 1994); Anesthesiologists Assoc. v. St. Benedict's Hosp., 852 P.2d 1030, 1035 (Utah App. 1993). Only if the court determined that the language was ambiguous could the court consider extrinsic evidence.

In this case, the trial court did not determine that an ambiguity existed regarding the language of the indemnification provision. Thus, the court was required to look to the plain language of the indemnification provision to determine the impact of that provision on Arne's investment obligation. Hall v. Process Instruments and Control, Inc., 866 P.2d 604, 606 (Utah App. 1993); Gordon v. CRS Consulting Engineers, Inc., 820 P.2d 492, 493 (Utah App. 1991).

The plain language of the indemnification provision indicates that Arne's would be indemnified by VMMC from any loss it incurred by reason of its $2,000,000 investment obligation, not that it was relieved from its obligation of providing the $2,000,000. The trial court's finding to the contrary is inconsistent with the reasonable construction of the provision.

Utah law provides that a release is to be strictly construed, and that for a release to be enforceable, it must be, at a minimum, unambiguous, explicit and unequivocal. Simonson v. Travis, 728 P.2d 999, 1002 (Utah 1986); Kraus v. Utah State Dept. of Transportation, 852 P.2d 1014, 1019 (Utah App. 1993), cert denied, 862 P.2d 1356 (Utah 1993). The purported release found by the trial court in the indemnification provision of the Guaranty

Agreement does not meet this standard. That language does not unambiguously, explicitly and unequivocally state that Arne's is to be released from its $2,000,000 investment obligation.

The trial court did not follow established rules of contract construction in ruling that the Guaranty Agreement released Arne's from its obligation to invest $2,000,000 in the project, and that decision should be reversed.

B. Arne's Was Not Released By The Guaranty Agreement From Its Obligation To ACMC To Invest $2,000,000 In The Venture Because ACMC Was Not A Party To The Guaranty Agreement.

ACMC was not a party to the Guaranty Agreement which, pursuant to the trial court's ruling, released Arne's from its obligation to invest $2,000,000 in the joint venture. Only VMMC executed the Guaranty Agreement, and therefore only VMMC can be bound by any release arising therefrom.

It is a basic tenet of the law governing releases that a release will not extend to or have any effect upon the rights of persons not a party to the release. Harrison v. Lucero, 525 P.2d 941, 944 (N.M. App. 1974). ACMC was not a party to the Guaranty Agreement and thus its right to require Arne's to fulfill its obligation to invest $2,000,000 in the project was not affected in any way by the purported release contained therein. The trial court's ruling to the contrary constitutes reversible error and should be reversed.

C. Arne's Subsequently Reaffirmed Its Obligation To Invest $2,000,000 In The Venture.

Even if the indemnification provision in the Guaranty Agreement constituted a release of Arne's obligation to invest

$2,000,000 in the project, and even if that release were binding on ACMC, Arne's still was obligated to make the $2,000,000 investment pursuant to its subsequent execution of the Revised Nov. 11 Agreement in January, 1986.

In November, 1985, the parties desired to consolidate many of their prior agreements into a single contract. The Nov. 11 Draft Agreement was prepared by counsel and reviewed by the parties, and changes were written on it, but it was not finalized or executed at that time. [TR (8/30/93) 37:9-39:17; Ex. 12.]

After the Guaranty Agreement was signed by VMMC on December 13, 1985, and the extension of time to exercise the option to purchase the Victoria Mill had been obtained, VMMC was unable to continue with the mining and milling operation due to a lack of funds. During the last part of December, 1985, Sullivan came to Moeller, and indicated that Arne's wanted to continue with the project. At that time, Sullivan called VMMC's attorney in Ohio, told him that Arne's wanted to go forward with the project, and asked him to make the revisions that had been written on the Nov. 11 Draft Agreement, and send the Revised Nov. 11 Agreement to him. [TR 53:11-55:3.]

On January 2, 1986, the attorney sent the Revised Nov. 11 Agreement to Sullivan. [Ex. 19.] Shortly after it was received, Sullivan signed the contract on behalf of Arne's and himself individually, and forwarded the contract to Moeller. [TR (8/30/93) 79:9-19.] Moeller signed the Revised Nov. 11 Agreement on behalf

of ACMC and VMMC on January 12, 1986. [TR (2/28/94) 44:12-21; Ex. 13, App. F.]

The Revised Nov. 11 Agreement expressly set forth Arne's and Sullivan's obligation to provide the $2,000,000 that was necessary to purchase the Victoria Mill. [Ex. 13, App. F.] Even if Arne's had been released from its investment obligation by the execution of the Guaranty Agreement, both Arne's and Sullivan accepted that same obligation again when they signed the Revised Nov. 11 Agreement in January, 1986.

The Revised Nov. 11 Agreement stated in its preamble that it was "made and entered into as of November 11, 1985." [Ex. 13, App. F.] Arne's argued at trial that, based upon that language, even though the contract was signed in January, 1986, after the Guaranty Agreement was signed, the court was required to treat the contract as having been signed on November 11, 1985, prior to the execution of the Guaranty Agreement. Thus, Arne's argued, since the release granted by the Guaranty Agreement occurred "after" the investment obligation had been reinstituted by the Revised Nov. 11 Agreement, the investment obligation in the Revised Nov. 11 Agreement was no longer binding upon Arne's. In embracing that argument, the trial court committed reversible error.

The whole purpose of entering into the Revised Nov. 11 Agreement in January, 1986, was to resurrect the project that in essence had died, or was dying, for lack of money. The acquisition of the Victoria Mill was essential to the operation, and an infusion of capital was required to complete that purchase. The

option to purchase the mill had been extended until January 31, 1986. The purpose for the $2,000,000 investment by Arne's and Sullivan was to be able to exercise the option and purchase the mill.

Had Arne's and Sullivan not been willing to invest the $2,000,000 called for in the contract, they would have caused it to be stricken from the final agreement. They did not do so. Instead, Sullivan had the Ohio attorney make the revisions that had been requested previously, which Sullivan signed personally and on behalf of Arne's upon its receipt in January, 1986.

It is important to note that the parties did not simply sign the Revised Nov. 11 Agreement in the form received from the attorney. Instead, they made handwritten changes to the contract, modifying the terms thereof. [Ex. 13, App. F.] Had the contract provisions regarding the $2,000,000 investment obligation been unacceptable at the time Sullivan reviewed the contract in January, 1986, he could have modified it, as he had done with other provisions in the document. No such modification was made to the investment obligation. Obviously, Arne's and Sullivan were willing to go forward with the project, according to the terms of the Revised Nov. 11 Agreement.

Where the Revised Nov. 11 Agreement was executed after the execution of the Guaranty Agreement, the Guaranty Agreement cannot constitute a release of the investment obligation provided in the Revised Nov. 11 Agreement as a matter of law.

POINT IV

ARNE'S WAS NOT ENTITLED TO AN ADDITIONAL MONEY JUDGMENT AGAINST ACMC BECAUSE OF THE JUDGMENT OBTAINED BY BECHO INC. AGAINST ARNE'S

Under the Trucking Agreement, Arne's was obligated to remove the overburden, mine the ore, crush the ore, and deliver the ore to the mill. The compensation which Arne's agreed to accept for such services was the $10.25 (and later @12.25) per ton of ore delivered to the mill. [Ex. 1, App. C.]

Arne's chose to subcontract a portion of the work it had contracted to do to Becho, Inc. ["Becho"]. [TR (8/30/93) 59:4-8.] Arne's apparently failed to make all of its required payments to Becho and Becho obtained a judgment against Arne's. Arne's in this action sought an additional money judgment against ACMC for the amount of the judgment that Becho obtained against Arne's. The trial court granted Arne's request, and awarded Arne's judgment against ACMC in an amount equal to the principle and interest owed by Arne's on the Becho judgment, which was $110,880.42. [R 640, App. B.]

The trial court erred in awarding Arne's judgment against ACMC for the amount of the Becho judgment. Arne's was not entitled to any additional payment from ACMC for the work performed by Becho. Becho was performing a portion of the services required of Arne's under the Trucking Agreement, at Arne's request. Arne's is entitled to payment for its services under the Trucking Agreement, but it must pay its obligation to Becho out of the amounts it receives for its services.

Arne's was awarded a judgment by the trial court for the amounts which it was owed under the Trucking Agreement. That judgment fully satisfies Arne's claims against ACMC. The amounts owed by Arne's to Becho are reflected in, and constitute part of, Arne's judgment against ACMC. The award to Arne's of an additional judgment for the amount of Becho's judgment constitutes a duplicative award for the same damages. Accordingly, Arne's is not entitled to an additional judgment against ACMC for the amount of Becho's judgment against Arne's. In granting that additional money judgment, the trial court committed reversible error.

POINT V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING ARNE'S TO FORECLOSE ITS MECHANICS' LIENS AGAINST ACMC'S MINING CLAIMS WHERE THE LIENS INCLUDED AMOUNTS FOR NON-LIENABLE CLAIMS AND FAILED TO SEGREGATE THE AMOUNTS CLAIMED TO THE SPECIFIC MINING CLAIM ON WHICH THE WORK WAS PERFORMED

The amended notice of lien filed by Arne's on March 21, 1986, asserted a claim against ACMC's mining claims in the sum of $883,679.41. [Ex. 17, App. J.] That notice was defective, and the trial court erred in allowing it to be foreclosed against ACMC's mining claims.

A. Arne's Mechanics' Lien Was Improper Because It Included Non-Lienable Claims.

At the time the mechanics' lien was filed, the total amount which Arne's claimed was owed to it under the Trucking Agreement was $535,880.06. That amount consisted of $246,680.60 for mining and hauling services, $268,245.00 for additional overburden removal charges, and $20,954.46 for fuel, parts and other miscellaneous

expenses. [R 632-633 at 5-6, ¶20, App. B.; TR (8/31/93) 4:17-18:15.]

$347,799.35 of the total amount included by Arne's in its lien was unrelated to the services provided under the Trucking Agreement. That amount included the sum of $144,270, which was the amount loaned by Arne's to VMMC on December 13, 1985, for use in obtaining an extension of time to exercise its option to purchase the Victoria Mill. [TR (8/31/93) 4:17-5:17.] The balance reflected Arne's claim for interest at the contract rate of 2½% per day. [Ex. 17, App. H.]

Utah's mechanics' lien statute provides in pertinent part as follows:

> Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner ... shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, ...

Utah Code Ann. §38-1-3.

It is clear that mechanics' liens may be filed on mining claims. Park City Meat Co. v. Comstock Silver Mining Co., 36 Utah 145, 148, 103 P. 254, 257 (1909).[6] However, in order to do so, the claim must be a lienable claim within the meaning of the statute.

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[6] In 1987 the Utah Legislature amended Utah lien law and moved liens related to mining and oil and gas activities to Utah Code Ann. § 38-10-101 et seq. However, this amendment was subsequent to the assertion of the lien by Arne's.

The inclusion in the lien of the $144,270 that was loaned by Arne's to VMMC clearly was improper. That amount was not owed to Arne's for "services rendered, labor performed, or materials or equipment furnished or rented" by Arne's. It arose merely as a result of a loan made by Arne's to preserve VMMC's right to purchase the Victoria Mill.

The mechanics' lien statute is intended to protect laborers and materialmen who enhance the value of the property. Bailey v. Call, 767 P.2d 138, 140 (Utah App. 1989), cert. denied, 773 P.2d 45 (Utah 1989). The loan made by Arne's to VMMC did not enhance ACMC's mining claims at all. Thus, that obligation is not within the coverage of the statute, and it was improper to include the amount of that debt in the amended notice of lien.[7]

The interest claimed by Arne's also was not properly included in the amended notice of lien. It was calculated at the contract rate of 2½% per day. The trial court properly ruled that such a rate was unconscionable and constituted a penalty. [R 611-612, App. A.]

The inclusion of the amounts claimed for additional overburden removal also was improper. As stated above, the trial court erred in finding the existence of an oral modification of the Trucking

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[7] The $144,270 debt is non-lienable not only because of the nature of the debt, but also because it was not incurred by a contractor or laborer. Arne's made the loan of the $144,270 to VMMC in his capacity as a joint venturer in the project. Persons claiming the right to assert a mechanic's lien must belong to some class in whose favor the remedy of the statute is afforded. Joint venturers or partners who loan money to a venture of which they are a participant are not included within the protection of the statute and may not claim a lien on the property. See Damrell v. Creagar, 599 P.2d 262, 264 (Colo.App. 1979).

Agreement. Arne's based its claim for additional charges for overburden removal on that oral modification. Finally, Arne's included standby expenses in its lien. The trial court disallowed all standby claims.

The Utah Supreme Court has not ruled on the issue of whether overstated lien amounts or inclusion of non-lienable items in a lien constitute grounds for invalidating the lien. However, the Oregon Court of Appeals has addressed that issue. The Oregon court has stated that the purpose of requiring liens to be properly segregated as to property and amount and only include items for which a lien may be claimed is to allow the property owner to determine on the face of the liens whether or not they are valid so to be able to properly discharge valid ones before foreclosure proceedings are commenced and thereby avoid cost of litigation. Robertson, Hay & Wallace v. Kunkel, 686 P.2d 399, 402 (Or.App. 1984); Deal v. Edwards, 624 P.2d 1099, (Or.App. 1981).

The amounts of Arne's lien were overstated by not less than $350,000. The lien included amounts that clearly were non-lienable. ACMC was forced to expend thousands of dollars in litigation costs to defend against the excessive amounts claimed in the lien. Further, the excessive lien clouded ACMC's title to its mining claims from 1986 until the amount of the lien was properly reduced in 1994. The misleading nature of the lien and the prejudice suffered by ACMC are readily apparent. Public policy should abhor and discourage outrageously excessive mechanics' liens. However, the trial court rewarded Arne's for filing liens

in excess of $350,000 more than it could legitimately claim through the mechanics' lien process. The trial court rewarded Arne's by allowing it to foreclose its excessive lien and also granting attorneys fees to Arne's for its foreclosure efforts.

Given the outrageously excessive amount of the mechanics' lien, the trial court should have ruled that it was fatally defective as a matter of law, refused to allow its foreclosure, and not awarded any attorneys fees for the foreclosure effort. This Court should correct the trial court's error by reversing its judgment on this issue.

B. Arne's Failure To Allocate In Its Lien The Specific Amounts Of The Total Claim Which Were Due On Each Individual Mining Claim Resulted In Prejudice To ACMC, Thereby Invalidating The Lien And Precluding Its Foreclosure.

Not only did Arne's lien include non-lienable claims and overstate the value of those claims, but it also failed to allocate the specific amounts of the total claim which were due on each particular mining claim. Section 8 of the mechanics' lien statute provides:

> Liens against two or more buildings or other improvements owned by the same person may be included in one claim; but in such case the person filing the claim must designate the amount claimed to be due to him on each of such buildings or other improvements.

Utah Code Ann. §38-1-8.

By failing to designate the amount due for services rendered on each individual mining claim, Arne's violated the statute and prejudiced ACMC.

In Projects Unlimited v. Copper State Thrift, 798 P.2d 738, 747 (Utah 1990), the Utah Supreme Court interpreted §8 of the

mechanics' lien statute, holding that a notice of lien will not be deemed invalid merely because the claimant fails to segregate the contract amounts attributable to each individual property. The court suggested, however, that a different outcome may result if the lien misled the property owner or if the property owner was able to demonstrate prejudice from the aggregation of the claims. Projects Unlimited, 798 P.2d at 748.

In this case, ACMC was prejudiced by Arne's failure to segregate the contract amounts to the specific mining claims on which the work was performed. The effect of the blanket lien was to impress each of the four mining claims with a $883,679.41 lien, this effectively quadrupling the lien of Arne's. The prejudice to ACMC is obvious. Its mining claims were each clouded with a $883,679.41 lien. It could not effect the release of any of its claims by satisfying a proper lien for the proper amount of work done on that particular claim as contemplated and required by Utah Code Ann. § 38-1-8. This prejudice continues to this date as the liens have never been properly segregated.

Accordingly, this Court should reverse the decision of the trial court on that issue.

CONCLUSION

Each of the errors of the trial court demand relief from this Court. The amount of the judgment for overburden removal, $427,850 plus interest, should be reversed as the ruling of the trial court that the Trucking Agreement was modified was an error of law.

The judgment against ACMC should similarly be reduced as a matter of law by the amount of $144,270. The trial court erroneously ruled that ACMC was required to repay that amount advanced by Arne's to VMMC.

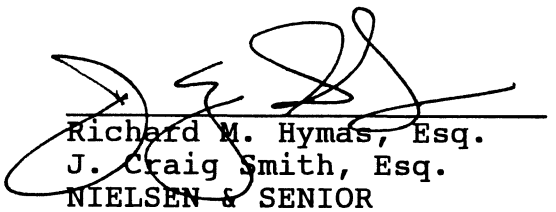
Also, the trial court's dismissal of the counterclaim of ACMC should be reversed or remanded for further proceedings. The trial court erred in holding that Arne's was released from its obligation to invest $2,000,000 in the joint venture. The failure to invest the $2,000,000 was a breach of contract that damaged ACMC, and they should be allowed to pursue and recover those damages.

Similarly, the award of duplicate damages for the Becho claim must also be reversed. The judgment should be reduced by the amount of principal and interest awarded on that claim.

Finally, this Court should reverse the ruling of the trial court allowing the assertion and foreclosure of fatally defective mechanics' liens of Arne's and the award of attorneys fees and interest thereon. Arne's should not be rewarded for filing grossly exaggerated blanket liens.

For the reasons set forth above, the Court should reverse the judgment entered herein, and enter judgment in favor of ACMC or, alternatively, remand the case to the trial court for a new trial.

DATED this 9th day of June, 1995.

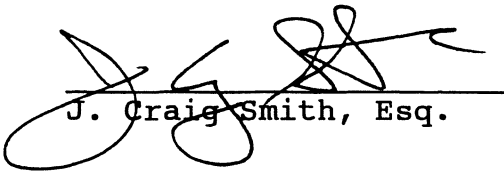


Richard M. Hymas, Esq.
J. Craig Smith, Esq.
NIELSEN & SENIOR
Attorneys for Appellant
American Consolidated
Mining Co.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 1995, I served upon Plaintiff/Appellee true and correct copies of the foregoing **BRIEF OF APPELLANT** by causing two copies thereof to be mailed, first class, postage prepaid, to the following:

J. Thomas Bowen, Esq.
Attorney for Arne's American, Inc.
935 East South Union Avenue
Suite D-102
Salt Lake City, UT 84047



J. Craig Smith, Esq.

APPENDIX

A. MEMORANDUM DECISION [R-608-617]

B. FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT [R-628-642]

C. TRUCKING AGREEMENT [Exhibit 1]

D. SEPTEMBER 8, 1985 AGREEMENT [Exhibit 2]

E. OCTOBER 11, 1985 AGREEMENT [Exhibit 4]

F. NOVEMBER 11, 1985 AGREEMENT [Exhibit 13]

G. DECEMBER 12, 1985 AGREEMENT [Exhibit 14]

H. DECEMBER 13, 1985 AGREEMENT [Exhibit 15]

I. January 2, 1986 Letter [Exhibit 19]

J. NOTICE OF LIEN dated 3/18/86 [Exhibit 17]

K. INVOICE No. AA 10365 dated 3\24\86 [Exhibit 21]
INVOICE No. AA 10364 dated 2\19\86 [Exhibit 21]
INVOICE No. AA 10363 dated 2\3\86 [Exhibit 21]
INVOICE No. AA 10361 dated 1\2\86 [Exhibit 21]
INVOICE No. AA 10360 dated 12\26\85 [Exhibit 21]
INVOICE No. AA 10359 dated 12\18\85 [Exhibit 21]
INVOICE No. AA 10358 dated 12\18\85 [Exhibit 21]
INVOICE No. AA 10357 dated 12\5\85 [Exhibit 21]
INVOICE No. AA 10456 dated 11\29\85 [Exhibit 21]
INVOICE No. AA 10349 dated 11\3\85 [Exhibit 22]
INVOICE No. AA 10346 dated 10\18\85 [Exhibit 23]

L. COMPILATION OF INVOICES AND PAYMENTS (Exhibit 31]

Tab A

NOV 15 1994

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ARNES AMERICAN, a Utah corporation,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 910907995
vs.	:	
AMERICANS CONSOLIDATED MINING CO., et al.,	:	
Defendants.	:	
BECHO, INC.,	:	
Plaintiff,	:	
vs.	:	
ARNES AMERICA, a Utah corporation, et al..	:	
Defendants.	:	

This matter was before the Court for trial commencing on August 30, 1993 and various dates thereafter, concluding on February 28, 1994. Following close of evidence, counsel submitted final trial briefs and the Court then undertook a review of the evidence received, testimony and exhibits, as well as the Court's own trial notes and the transcript that was prepared. Being otherwise fully advised, the Court issues the following decision.

In this case, both the plaintiff and the defendants have asserted claims. The Court will attempt to deal with the claims the parties have made in a summary fashion. Where the Court finds for a particular party on a particular issue or claim, unless otherwise stated, the Court adopts the position argued by the prevailing party on that issue and resolves any disputed issue of fact in favor of the prevailing party on that issue.

The plaintiff seeks payment for work done under an Agreement, dated September 1, 1985, known as the "Trucking Agreement".

Plaintiff further seeks to receive compensation for monies that were claimed loaned to the defendants.

Plaintiff further seeks to foreclose a mechanic's lien against the defendants' mining properties.

The defendants assert that the plaintiff has breached the Trucking Agreement, and that the defendants have been damaged as a result thereof. Defendants claim that the monies which the plaintiff claims were loaned were actually investments, and that the mechanic's lien is defective and should not be enforced.

Both parties seek attorney's fees in connection with their claims and counterclaims.

The Court finds and holds that the plaintiff is entitled to recover under the so-called "Trucking Agreement" (Exhibit 1) for

the ore hauled in the amounts alleged. Defendants controlled the mining properties to the extent that the defendants directed the plaintiff where to mine and what to haul. Defendants' suggestion that the plaintiff failed to haul "ore" is not persuasive in view of the fact that the actual material hauled was at the direction of the defendants. The amounts claimed, both in rate and amount hauled by the plaintiffs, are supported by the better evidence and the Court finds the plaintiff's calculations on the tonnage and the rate to be correct and recoverable.

The Court is further satisfied and finds that the plaintiff's evidence is most persuasive on the issue of plaintiff's claims of payment for overburden. The Court finds that there was an agreement to pay for hauling overburden at $2.10 per yard. The Court finds sufficient evidence, both through testimony, part performance, acknowledgment and payment, along with limited writings, all as asserted by the plaintiff, to support a modification of the Trucking Agreement and obligate the defendants for the costs of moving the overburden.

The expenses claimed by the plaintiff for equipment charges, purchase orders and fuel are all recoverable against the defendants. The plaintiff has paid for those items and is entitled

to reimbursement for the same, all of which furthered the process of the mining and hauling of the ore and overburden.

The Court finds against the plaintiffs on its claim for "standby" expenses. While the evidence would support the finding that all parties may have hoped the venture would continue, there is not sufficient persuasive evidence that any agreement was reached on that issue so as to give rise to a valid claim on the part of the plaintiff for "standby" expenses.

The Court finds that the $144,000 paid by the plaintiff was, as plaintiff alleges, a loan and not an investment as defendants assert. The plaintiff is entitled to repayment of those amounts loaned to the defendants.

The Court finds the plaintiff's position and evidence persuasive on the alleged claim of the defendants that the plaintiff was obligated to provide $2 million in funding. The evidence shows that the plaintiff was relieved of that obligation, all as suggested by the plaintiff's evidence and the exhibits dealing with that issue.

As to the plaintiff's claims that interest should be determined on amounts due under the Trucking Agreement at the contract rate of 2-1/2% per day, the Court finds that such a rate amounts to a penalty of unconscionable proportions and is therefore

not enforceable, even though the defendants signed the contract agreeing to that rate. An interest rate that constitutes a penalty and bears no relationship whatever to the loss of use of those funds cannot be enforced. The plaintiff is entitled to interest, both pre- and post-Judgment but only at statutory rates.

The Court finds against the defendants on their claim that the plaintiff breached the Trucking Agreement or that it engaged in fraud or misrepresentation. The defendants' evidence on those issues are unpersuasive and do not meet the requisite burden of proof.

The plaintiff's claims that Becho, Inc. obtained a Judgment in this case against the plaintiff in Becho's status as subcontractor, all because of the defendants' refusal to properly meet its financial obligations in this venture. The plaintiffs then allege that in turn they are entitled to a like Judgment over against the defendants, based upon Becho's Judgment against the plaintiff. For the reasons asserted by the plaintiff, the Court concludes that such a request is appropriate.

Defendant's assertions that the lien claims are defective, either under a failure of proof thereof or defective or improper filing of the lien are not persuasive and the Court finds against the defendants on those claims.

Having determined that the plaintiff has not breached the agreements between the parties, the Court finds against the defendants on their claims against the plaintiff, no cause of action.

The plaintiff is entitled to Judgment in accordance with the determinations based herein, and as claimed by the plaintiff, except as modified by this Court's ruling on interest and "standby" expenses. Plaintiff is entitled to foreclose its mechanic's lien on those items that relate to the plaintiff's efforts and work done at the mine.

As prevailing party, the plaintiff is entitled to Rule 54(b) costs under the Utah Rules of Civil Procedure.

The Court has reserved the question of attorney's fees pending a determination of which of the parties were prevailing. While the plaintiff has not prevailed on all issues, it has prevailed on a majority of the claims and is therefore entitled to fees and costs as prevailing party under the lien statutes on those claims that have been brought pursuant to the mechanic's liens statutes, and fees as may otherwise be available legally to the prevailing party.

Counsel for the plaintiff may submit with the final documentation in this case an Affidavit of Attorney's Fees which may specifically by reference, if counsel deems it appropriate,

incorporate prior pleadings and documentation, so as to set forth the amount of attorney's fees claimed. The attorney's fee affidavit needs to be specific as to attorney's fees that deal with the mechanic's lien claims and those that do not, so that those can be separated as might otherwise be appropriate.

The Court directs that counsel for the plaintiff prepare proposed Findings of Fact, Conclusions of Law, and Judgment, all in accordance with the rulings set forth in this Memorandum Decision. The Court recognizes that the plaintiff has not prevailed on all issues and while the Court would request that the plaintiff incorporate the rulings on interest and standby that were determined in favor of the defendants, once the Findings of Fact, the Conclusions of Law and the Judgment have been prepared by plaintiff's counsel, they should be reviewed by defendants' counsel for any additional modifications that would be appropriate on those issues where the defendant has prevailed. The Court will expect detailed Findings of Fact and Conclusions of Law that would properly reflect the Court's decision where the Court has determined that the plaintiff's position is persuasive and adopted the same for purposes of ruling.

Once the documents have been prepared and approved as to form by both counsel, the documents should be submitted to the Court for final review and signature.

Should there be objections with regard to the amount of attorney's fees claimed, specified in the Affidavit and documentation that plaintiff's counsel will be submitting in connection therewith, defendant's counsel should make the objection in writing, specifically referring to the attorney's fees objected to and the reasons therefore. The objections should be submitted within ten (10) days following the filing of the Affidavit of Attorney's Fees by plaintiff's counsel. Should counsel for the plaintiff choose to respond to any objections to attorney's fees, those responses should be filed within five (5) days from the filing of the objections. The Court will then resolve the objections based upon the written materials submitted.

Finally, should the parties be unable to agree as to a proper set of Findings of Fact, Conclusions of Law, and appropriate form of Order and Judgment, the Court will expect the objecting party to submit a detailed Objection specifically referring to the proposed Findings, Conclusions and Judgment, so that the Court can evaluate the Objection, test it against the evidence, consider the non-objecting party's position, if one is made, and resolve any issues regarding the proper form of Findings of Fact, Conclusions of Law, and Order and Judgment without the necessity of putting the parties

to further expense in connection with any in-court hearing on that issue.

Dated this 15 day of November, 1994.

TIMOTHY R. HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 15 day of November, 1994:

J. Thomas Bowen
Attorney for Plaintiff Arne's
~~68 S. Main, Suite 800~~ 935 Ea So Union Ave
~~Salt Lake City, Utah 84101~~ 84047

Mark K. Stringer
Attorney for Defendants American and Victoria
37 E. Center Street, Second Floor
Provo, Utah 84606

Evelyn Thompson

Tab B

J. THOMAS BOWEN #0396
935 East South Union Avenue, #D102
Salt Lake City, Utah 84047
Telephone (801) 566-5298

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

ARNES AMERICAN, a Utah corporation, Plaintiff, vs. AMERICANS CONSOLIDATED MINING CO., et al., Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 910907995 Judge: TIMOTHY R. HANSON
BECHO, INC., Plaintiff, vs. ARNES AMERICAN, a Utah corporation,et al., Defendants.	

This matter having come on before the court for trial commencing on August 30, 1993 and various dates thereafter, concluding on February 28, 1994. The court having been advised by evidence and argument and having reviewed the trial briefs of the parties, the testimony and exhibits, as well as the court's own

trial notes and the transcript that was prepared now makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff is a corporation incorporated under the laws of the state of Utah.

2. Defendant, American Consolidated Mining, Co., is a Utah corporation doing business in Tooele County, Utah.

3. Defendant, Victoria Mining and Milling Company, is a Nevada corporation which was doing business in Tooele County, Utah.

4. American Consolidated Mining Company is the owner of patented lode mining claims, located in the Clifton mining district of Tooele County and commonly known as the Herat Lode Mining Claim, Lot 39, as described in that certain United States patent to George D. Shall, Charles W. Watson recorded May 24, 1899, in Book "DD", pages 24-26 of the official records of the County Recorder of Tooele County, state of Utah; Centennial Lode Mining Claim (Claim No. 5151); Cosmopolitan Lode Mining Claim (Claim No. 4382); Copperapolis Lode Mining Claim (Claim No. 4382); and Yellow Hammer Lode Mining Claim (Claim No. 4382).

5. On or about September 1, 1985, Plaintiff and Defendants, American Consolidated Mining Co. and Victoria Mining and Milling Company, entered into an Agreement (the "Trucking Agreement") pursuant to which Plaintiff agreed to conduct a mining operation, and transport the material from the mine sites in Tooele County, Utah to the mill site known as the Victoria "Mine" located in

Nevada. The mill was leased by Defendants, with an option to purchase, from Hecla Mining Company.

6. Pursuant to the terms of the said Agreement, Defendants agreed to pay Plaintiff the sum of Twelve Dollars and Twenty-five Cents ($12.25) per ton of ore delivered to the mill site, which amount represents a reasonable value for such materials, labor and services.

7. Beginning on or about September 1, 1985 through December 20, 1985, Plaintiff supplied materials, labor and services at the request of the Defendants for the Herat Lode Mining Claim, Lot 39 under the said Trucking Agreement.

8. Beginning on or about September 1, 1985 through December 31, 1986, Plaintiff supplied materials, labor and services for the Centennial, Cosmopolitan, Copperapolis and Yellow Hammer Lode Mining Claims under the Trucking Agreement.

9. The Defendants controlled the mining properties to the extent that the Defendants directed Plaintiff where to mine and what to haul.

10. Defendants also directed Plaintiff to stockpile some material rather than delivering it to the mill site. Plaintiff is entitled to be paid by Defendants for this ore at the contract rate.

11. The actual material hauled by Plaintiff was at the direction of the Defendants. Therefore, Defendants' suggestion that Plaintiff failed to haul "ore" is not persuasive.

12. The Defendants paid Plaintiff for a portion of the ore hauled without complaint and did not give Plaintiff notice of any claimed failure to deliver ore as required by paragraph 18 of the Trucking Agreement.

13. In its performance of the Trucking Agreement, Plaintiff hauled 45,034.81 tons of ore for which it is entitled to compensation at the rate of Twelve Dollars and Twenty-five Cents ($12.25) per ton or Five Hundred and Fifty-one Thousand Six Hundred and Seventy-six Dollars and Forty-two Cents ($551,676.42).

14. In early October 1985, the parties met in the bunk house of the Victoria Mill and discussed the removal of excess overburden. The parties agreed, at that time, that Plaintiff would be compensated at the rate of Two Dollars and Ten Cents ($2.10) per yard for overburden removed to areas designated by Defendants or their representatives. Thereafter, Mel Craig and Bob Holliday, employees of Defendants, staked out areas in which Plaintiff could dump the overburden. Plaintiff thereafter changed its method of mining and overburden removal and complied with the directions of Defendants and removed the overburden to the designated areas.

15. Plaintiff also modified its billings to include a separate charge for overburden removal to which Defendants made no complaint.

16. There was a modification of the Trucking Agreement, through part performance, acknowledgement and payment obligating the Defendants to pay for the costs of overburden removal at the rate of $2.10 per yard.

17. At the direction and request of Defendants, Plaintiffs hauled or removed two hundred three thousand seven hundred and thirty-eight yards (203,738) of overburden material for which Plaintiff is entitled to compensation in the amount of Four Hundred and Twenty-seven Thousand Eight Hundred and Fifty Dollars ($427,850).

18. Plaintiffs further provided rental equipment, fuel, parts and other items for which it is entitled to compensation from the Defendants.

19. Defendants have paid to Plaintiff in cash the sum of Two Hundred and Forty-three Thousand Three Hundred and Five Dollars ($243,305). In addition thereto, Plaintiff traded a portion of its charges for an equity position in the joint venture entity which was formed by Defendants and others to conduct the mining operation.

20. There remains due and owing from Defendants to Plaintiff the sum of Two Hundred and Forty-six Thousand Six Hundred and Eighty Dollars and Sixty Cents ($246,680.60) for hauling charges; the sum of Two Hundred and Sixty-eight Thousand Two Hundred and Forty-five Dollars ($268,245) for overburden removal, and the sum of Twenty Thousand Nine Hundred and Fifty-four Dollars and Forty-six Cents ($20,954.46) for fuel, parts and forklift rental, calculated as follows:

Hauling

October-Adj [Ex. 21G]	667.5 tons	=	$ 8,176.88
November [Ex. 21G]	8,892.25 tons	=	108,930.06
December [Ex. 21D]	10,577.44 tons	=	129,573.66
TOTAL			$246,680.60

Overburden

October [Ex. 22]	$ 23,335.00
November [Ex. 21G]	85,830.00
December [Ex. 21D]	159,080.00
TOTAL	$268,245.00

Parts, Fuel, etc. [Ex. 31]

Forklift Rental	$1,338.00
Fuel	5,186.35
Fuel	6,319.65
Parts	3,686.00
Fuel	2,872.50
Parts	288.05
Parts	1,263.91
TOTAL	$20,954.46

21. Throughout the course of their dealings, the parties entered into various agreements modifying their relationship and adjusting the ownership interests in the joint venture operating entity.

22. The parties ultimately entered into an agreement (Exhibit 13) which by its terms was entered into as of November 11, 1985.

23. Although the final draft of Exhibit 13 was actually signed by the parties in January 1986, it was drafted and reviewed by the parties in November 1985 and sent to Defendants' attorney for a final redraft. The parties agreed that it would take effect as of November 11, 1985.

24. Under the terms of Exhibit 13 Plaintiff agreed to provide $2,000,000 in funding for the project, with that amount to be repaid out of the project's cash flow.

25. Defendants obtained extensions from Hecla of their option to purchase the mill.

26. On or about December 13, 1985 Plaintiffs loaned to, or for the benefit of, Defendants the sum of One Hundred and Forty-four Thousand Two Hundred and Seventy Dollars ($144,270) to enable Defendants to obtain another extension of their option to purchase the Victoria Mine.

27. The payment by Plaintiff was a loan and not an investment and Plaintiff is entitled to repayment of the amount loaned to the Defendants. Defendants have not repaid Plaintiff for the loan.

28. As part of the consideration for Plaintiff making the subject loan, Plaintiff was completely relieved and indemnified by Defendants of any obligation that it had to provide the $2,000,000 in funding for the project. Defendants are not, therefore, entitled to damages, if any, for lost business opportunity, or expenses incurred in reliance upon Plaintiff's promised funding, nor to specific performance.

29. The tonnage hauled, the overburden removed and the forklift rental were labor, materials and services provide for the subject mining claims at the request of American Consolidated Mining Co., the owner of the claims, and were used in the improvement of the premises and are lienable charges.

30. Plaintiff filed two notices of lien in compliance with Utah Code Annotated §38-1-7. The first of which was dated March 10, 1986, the second of which was dated March 13, 1986. The mechanics liens were properly filed in the office of the County Recorder for Tooele County.

31. Plaintiff's liens are valid liens against the subject property which have not been paid or otherwise discharged. Plaintiff is entitled to foreclose its liens to recover the amounts due thereon, Five Hundred and Sixteen Thousand Two Hundred and Sixty-four Dollars and Six Cents ($516,264.06), plus interest thereon in the amount of Four Hundred Sixty-four Thousand Six Hundred Twenty-eight Dollars and Sixty-five Cents ($464,628.65).

32. Although operations ceased in December, 1985, Plaintiff continued in a "stand by" mode during January 1986.

33. There was, however, no agreement between the parties for the payment of standby expenses for the month of January 1986; therefore, Plaintiff is not entitled to recover from Defendants for those expenses.

34. The Trucking Agreement provides for interest at the rate of two and one half percent (2½%) per day, which amount was agreed to by the parties. Such rate, however, amounts to a penalty of unconscionable proportions and is therefore not enforceable.

35. Plaintiff is entitled to interest, both pre- and post-judgment at the statutory rate.

36. The Plaintiff did not breach the Trucking Agreement nor did it engage in fraud or misrepresentation.

37. The Defendants have not plead fraud or misrepresentation in their answer to Plaintiff's complaint. In any event, Defendant's evidence of fraud or misrepresentation is unpersuasive and does not meet the requisite burden of proof.

38. Defendants presented no evidence concerning the cost, if any, incurred in any claimed removal or clean-up after the project was abandoned, or for dumping overburden or material waste at the mill site. In any event, since Plaintiff did not breach the Trucking Agreement, and since all dumping and hauling of material was at the direction of Defendants, Defendants are not entitled to be compensated for any such claimed expense.

39. No refund is due to Defendants for any sums paid to Plaintiff.

40. Defendants failed to pay Plaintiff for work, materials, supplies and equipment for which Plaintiff was obligated to pay its subcontractors. Because of the failure of the Defendants to pay Plaintiff all sums due, specifically, the sum of Forty-four Thousand Two Hundred and Seventeen Dollars and Sixty-two Cents ($44,217.62) which was due and owing from Plaintiff to Becho, Inc., a judgment was entered against Plaintiff in the amount of Forty-four Thousand Two Hundred and Seventeen Dollars and Sixty-two Cents ($44,217.62) plus interest in the amount of One Hundred and Five Thousand Nine Hundred Dollars ($105,900) plus attorney's fees in the amount of Four Thousand Seven Hundred and Twenty-five Dollars ($4,725) plus costs of court in the amount of Two Hundred

Fifty-five Dollars and Forty-two Cents ($255.42) on behalf of Becho, Inc.

41. Paragraph 9 of the Trucking Agreement requires Defendants to indemnify Plaintiff for any loss, damage, cost, charge or expense by reason of Defendants' actions or omissions. Becho, Inc. was able to obtain a judgment against Plaintiff all because of the Defendants' refusal to properly meet its financial obligations to Plaintiff. As a result, Plaintiff is entitled to a like judgment over against the Defendants.

42. Plaintiffs incurred attorneys fees in the amount of Twenty-six Thousand Three Hundred Eighty-seven Dollars ($26,387.00) in prosecuting this action, which fees are fair and reasonable.

CONCLUSIONS OF LAW

1. Plaintiff is the successful party to this litigation and is entitled to attorneys fees pursuant to the terms of the Trucking Agreement and to §38-1-18 U.C.A.

2. Plaintiff is entitled to a judgment against Defendants in the amount of Six Hundred and Eighty Thousand One Hundred and Fifty Dollars and Fifty-two Cents ($680,150.52) plus interest thereon at the rate of ten percent (10%) per annum in the amount of Six Hundred and Twelve Thousand One Hundred and Thirty-five Dollars and Forty-six Cents ($612,135.46).

3. In addition thereto, Plaintiff is entitled to an additional judgment in the amount of One Hundred and Ten Thousand Eight Hundred and Eighty Dollars and Forty-two Cents ($110,880.42) representing the interest, attorney's fees and costs assessed in

the Becho judgment with interest thereon at the same rate of the Becho judgment from August 17, 1993.

4. Plaintiff is entitled to attorney's fees in this matter in the amount of Twenty-six Thousand Three Hundred and Eighty-seven Dollars ($26,387.00).

5. Plaintiff is entitled to foreclose its mechanics lien against the mining claims of American Consolidated Mining Company as identified in the Findings of Fact.

6. Defendants' counterclaim should be dismissed, no cause of action.

Dated this 8 day of ~~November~~ December, 1994.

TIMOTHY R. HANSON
District Court Judge

JUDGEMENT

J. THOMAS BOWEN #0396
935 East South Union Avenue, #D102
Salt Lake City, Utah 84047
Telephone (801) 566-5298

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

ARNES AMERICAN, a Utah corporation, Plaintiff, vs. AMERICANS CONSOLIDATED MINING CO., et al., Defendants. BECHO, INC., Plaintiff, vs. ARNES AMERICAN, a Utah corporation,et al., Defendants.	JUDGMENT 29.6774 12-13 94-801 am Case No. 910907995 Judge: TIMOTHY R. HANSON

This matter having come on before the court for trial commencing on August 30, 1993 and various dates thereafter, concluding on February 28, 1994. The court having been advised by evidence and argument and having reviewed the trial briefs of the parties, the testimony and exhibits, as well as the court's own trial notes and the transcript that was prepared. The court having

entered its Findings of Fact and Conclusions of Law it is hereby **ORDERED, ADJUDGED** and **DECREED** as follows:

1. Plaintiff is granted to a judgment against Defendants American Consolidated Mining Co., and Victoria Mining and Milling Company in the amount of Six Hundred Eighty Thousand One Hundred and Fifty Dollars and Fifty-two Cents ($680,150.52) plus interest thereon in the sum of Six Hundred Nine Thousand One Hundred Ninety-one Dollars and Twenty-seven Cents ($609,191.27) attorney's fees in the amount of Twenty-six Thousand Three Hundred and Eighty-seven Dollars ($26,387.00) plus costs of court in the amount of One Hundred and Thirteen Dollars ($113.00), for a total judgment of One Million Three Hundred Fifteen Thousand Eight Hundred Forty-one Dollars and Seventy-nine Cents ($1,315,841.79).

2. Plaintiff is granted an additional judgment of $110,880.42 which shall bear interest at the same rate as the Becho judgment granted against Plaintiff in these proceedings from August 17, 1993.

3. Plaintiff shall be entitled to a judgment of foreclosure against American Consolidated Mining with respect to the lien of Plaintiff, against the mining claims of American Consolidated Mining Co. located in the Clifton Mining District, Tooele County, State of Utah, described as Centennial Claim No. 5151, Cosmopolitan Claim No. 4382, Copperapolis Claim No. 4382, Yellow Hammer Claim No. 4382, in the amount of Five Hundred Sixteen Thousand Two Hundred Sixty-four Dollars and Six Cents ($516,264.06) plus interest thereon at the rate of ten percent (10%) per annum,

a total to date of Four Hundred Sixty-two Thousand Four Hundred Sixty-three Dollars and Ninety-two Cents ($462,463.92) plus attorney's fees in the amount of Twenty-six Thousand Three Hundred and Eighty-seven Dollars ($26,387.00), and costs of One Hundred and Thirteen Dollars ($113.00) for a total judgment of One Million Five Thousand Two Hundred Twenty-seven Dollars and Ninety-eight Cents ($1,005,227.98) and against the Herat Claim, Lot 39, Book "DD" pages 24-26 of the records of the County Recorder of Tooele, Utah in the amount of Twenty Thousand Dollars ($20,000.00) plus interest at 10% per annum from December 1985 in the amount of Eighteen Thousand Dollars ($18,000.00) for a total judgment of Thirty-eight Thousand Dollars ($38,000.00).

4. The court orders the sale of the said property pursuant to § 38-1-15 U.C.A. If Plaintiff's claim is not satisfied it may have a deficiency judgment for the unpaid balance as provided in §38-1-16 U.C.A.

5. The court of the Third District Court for Tooele County, State of Utah, is directed to place this judgment in the docket of Tooele County (the civil number for the proceeding in Tooele being No. 86-386). The portion of this judgment rating to foreclosure with respect to the property of American Consolidated Mining Co. is rendered none pro tunc to the time of filing with the Tooele County Recorder of Plaintiff's mechanics lien and the foreclosure thereof, as reflected in the Plaintiff's lis pendens, filed with the Tooele County Recorder on December 19, 1986.

6. The court has previously entered orders dealing with the interests of all other defendants.

7. This judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

Dated this 8 day of ~~November~~ December, 1994.

TIMOTHY R. HANSON
District Court Judge

Tab C

AGREEMENT with 2nd with 2nd

Agreement is made as of the First day of September, 1985, between Arne's American, Inc., a corporation organized under the laws of the State of Utah, hereinafter referred to as Arne's, and Victoria Mining and Milling Company, a corporation organized under the laws of the State of Nevada, and American Consolidated Mining, Inc., a corporation organized under the laws of the State of Utah, hereinafter collectively referred to as VMM and, as to paragraphs 5 through 10 only, and Winslow Cady, an individual, who shall also be jointly and severally responsible for the performance of those paragraphs.

WHEREAS, VMM possesses and controls certain tracts of lands and mining claims and rights located near Gold Hill, State of Utah, and may from time to time procure additional rights in such project area; and

WHEREAS, Arne's business is mining, crushing and hauling ore; and

WHEREAS, VMM has contracted to lease, with an option to purchase, certain tracts of land, mining rights and mill sites located near Currie, Elko County, Nevada, commonly referred to as the Victoria Mine; and

WHEREAS, the parties desire to enter into an agreement whereby Arne's shall operate a mining operation at Yellow Hammer Mine near Gold Hill, Utah in locations to be

determined by VMM, remove existing overburden to nearby areas clear of the mining operation, crush the ore to a maximum of 8 inches, and transport the ore to the mill site at Victoria Mine;

NOW THEREFORE, in consideration of these premises, and the terms, conditions and payments herein set forth and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. PROJECT AREA; RIGHT OF REFUSAL. The lands presently included in this agreement are those lands affected by the operations or proposed operations of the parties, which lands include all claims owned or leased by VMM at the Yellow Hammer Mine, and those claims adjoining or adjacent thereto. VMM further agrees to give Arne's a first right of refusal on other or subsequent mining operations on any of its other lands, claims or rights within a radius of 50 aerial miles of the Project Area.

2. TERMS; RIGHT OF ENTRY. Arne's shall have the ~~exclusive~~ right of entry on the Project Area to conduct mining operations thereon at any and all times during the term or this agreement. This agreement shall be binding on the parties hereto, for a continuous period of not less than twenty-four (24) months and shall thereafter remain binding for the life of the mining operations at the Project Area. VMM shall not employ or contract with any other persons or

corporations to conduct mining operations upon the Project Area or to haul ore therefrom during the term of this agreement.

3. MACHINERY AND EQUIPMENT. Arne's shall have the additional right of using any portion of the Project Area for the purpose of erecting any and all equipment that it may need to mine and remove the ore. Arne's shall also have the right, with the consent of VMM, which consent shall not be unreasonably withheld, to place on the Project Area all necessary machinery, tool sheds and other structures required by it in connection with its operations, with the full right to remove all such machinery, equipment and structures after termination of this agreement.

4. MINING OPERATIONS. Arne's shall mine the mineral(s) and use the methods which the parties mutually agree. Further, Arne's shall also remove, as is reasonably necessary, the trees, bushes, topsoil, subsoil and overburden in such amounts and using such methods as parties mutually agree, and shall stockpile the topsoil, subsoil and overburden as mutually agreed. Arne's shall be entitled to reasonable, additional compensation for any changes, modifications or additions to the methods and plans which the parties mutually agreed to use, which compensation shall also be mutually agreed upon by the parties. Further, Arne's shall receive a fee for mobilization and overburden removal at a prenegotiated price for setting up in any new mining location

at the request of VMM. It is the intent of the parties that mining operations under this agreement shall be conducted on such a scale as shall be sufficient to warrant Arne's in maintaining a mining organization adequate to carry on the business of mining continuously on the Project Area.

5. QUANTITY, PRICE. Arne's agrees to transport the ore to the mill site at Victoria Mine and VMM agrees to purchase VMM's requirements for the mill, reasonably expected to be 1,000 tons of ore per day after a reasonable start-up period for the parties not to exceed thirty (30) days. VMM will pay Arne's the sum of $10.25 per ton of ore delivered to the mill site, whether such ore is milled or not by VMM. Arne's shall be allowed to mine ~~at whatever rate it desires~~ and to stock pile at the mill site ~~as it deems necessary.~~ quantities of ore sufficient to sustain operation of mill as determined by VMMC.

6. ADJUSTMENT OF PRICE. The base sum of $10.25 per ton shall be adjusted based upon changes in the Consumer Price Index for All Urban Consumers: U.S. City Average, All Items Less Energy Unadjusted Indexes, (CPI) as of September 1, 1985, such that, as the CPI increases by a given percentage, the price per ton shall increase by that same percentage. Further, the base sum of $10.25 per ton also shall be adjusted based upon changes in the actual costs of fuel delivered to the Project Area after September 1, 1985. For purposes of this adjustment, it shall be assumed that $2.00 per ton of the base price is directly attributable to fuel costs. Accordingly, if the actual costs of fuel increases

by a given percentage, that portion of the base price directly attributable to fuel shall increase proportionately. For example, assume the actual costs of fuel delivered to the Project Area as of September 1, 1985 is $1.00/Gal. Further, assume that on March 1, 1986, such cost is $1.10/Gal. The proportionate increase in the base price would then be 20¢/ton ($2.00/ton times 10¢ divided by $1.00). Both adjustments for CPI and fuel costs shall be computed and implemented every six months on March 1 and September 1 during the term of this agreement.

7. BONUSES. An additional $1.00 per ton of ore delivered to the mill site shall be paid Arne's, so long as VMM has ore of sufficient quantity to provide a continual supply to the mill without any interruption and at least 1,000 tons of ore is available at the mill site at all times as a reserve after a reasonable start up period for the parties. The bonus shall be paid by the fifteenth day of any month preceding the end of each three successive months (or, in the initial instance, portion thereof) from the date of this agreement.

8. PAYMENTS. VMM shall pay Arne's by the fifteenth of each month for all ore delivered to the mine site the preceding month. Such payments shall include any adjustments pursuant to paragraph 6 above and, on a quarterly basis, any bonus pursuant to paragraph 7 above. Any payment not made by the fifteenth of the month shall accrue interest on the un-

paid balance at the rate of 2½ percent per day. No retainage or other holding back of payments shall be allowed at any time.

9. INDEMNIFICATION OF ARNE'S. VMM agrees to indemnify Arne's from any loss, damage, cost, charge, or expense, whether direct or indirect, and whether to persons or property, to which Arne's may be subjected by reason of any action, omission, or default of VMM or any subcontractor or VMM or any of VMM's officers, agents, or employees.

10. TAXES. Any and all taxes imposed by the laws of the United States, any state or locality, or other authority, including, but not limited to, severance, production and ad valorem taxes, arising from or relating to any mining operations which are the subject of this agreement shall be paid by VMM, including any interest or penalties thereon. VMM further agrees to indemnify and hold Arne's harmless from all liabilities arising from the imposition of any such taxes.

11. INDEMNIFICATION OF VMM. Arne's agrees to indemnify VMM from any loss, damage, cost, charge, or expense, whether or indirect, and whether to persons or property, to which VMM may be subjected by reason of any action, omission, or default of Arne's or any subcontractor or Arne's or any of Arne's officers, agents, or employees.

12. WEIGHTS. Accurate, reliable and maintained scales shall be located at the mill site by VMM. The parties agree that U.C.A. §40-3-1, et. seq., is applicable to the

weighing of ore under this agreement.

13. MAINTENANCE AND RECLAMATION. The parties agree that VMM will be responsible for all road construction and maintenance, including but not limited to drainage and erosion control, snow removal, surface repairs and resurfacing, from Highway Alternate 93 to the unloading site at the mill and Arne's agrees to be similarly responsible for road maintenance for the Yellow Hammer Mine site access roads and Arne's of VMM.

14. COMPLIANCE WITH STATUTES. VMM and Arne's shall comply with all federal, state and local government statutes, ordinances, and regulations affecting the Project Area, or any mining operations thereon, including but not limited to the ~~the~~ filing at the State of Utah, Division of Oil, Gas and Mining of a Notice of Intention to Commence Mining Operations and Mining and Reclamation Plan, the National Environmental Policy Act of 1969, the Surface Mining Control and Reclamation Act of 1977, the Utah Mined Land Reclamation Act, Rule M-10, Board of Oil Gas and Mining, any required notice of intent to operate on national forest lands, and any plan of operation required to be submitted to the Bureau of Land Management. Additionally, VMM and Arne's of VMM shall take all necessary or appropriate actions to ensure the public safety and welfare, including but not limited to the posting of appropriate warning signs and/or fences and the disposal of waste materials. Further, VMM shall dispose of all rock subjected to processing, such as waste rock or tailings, grade, spread,

redistribute, replaced and stabilize all topsoil, subsoil, and overburden, revegetate, and complete all reclamation schedules and plans.

15. EQUIPMENT AVAILABILITY. When not being used by VMM, it agrees to place at Arne's disposal equipment and other property currently at the mill site, including, but not limited to, two mine trucks, graders, loaders, trailer sites, bunk house, a four bedroom house in the residence area and any other facilities or equipment not normally required for support of VMM activities, along with the spare parts and equipment which are now on the site. Arne's shall be responsible for all maintenance of the equipment and other property of VMM when it is using the same.

16. FORCE MAJEURE. If, during the term of this agreement, any party shall be unable to perform its duties hereunder because of a strike of its employees, an act of God, fire, flood or other natural disaster, the unavailability of railroad or transportation equipment other than Arne's equipment, a strike by transportation employees other than Arne's or for any other cause beyond ~~Arne's~~ the party's reasonable control or as a result of any order issued by any government or official thereof, or if at any time during the term of this agreement VMM shall be unable to mill the ore on account of a strike of its employees, then this agreement shall be suspended during such period, and so long as any such conditions shall exist, Arne's shall not be required to provide

and VMM shall not be required to receive and purchase any ore hereunder, any other provision of this agreement to the contrary notwithstanding.

17. WARRANTIES. VMM warrants the title to its lands and the claims in the Project Area, as well as the right of ingress and egress over and through the Project Area. Further, VMM warrants that all statements and representations in its Notice of Intention are true and correct and may be relied upon by Arne's. VMM will indemnify and hold Arne's harmless from any damages that it may suffer by reason of any defect in title or in the right of ingress and egress or any untrue statement or representation in its Notice of Intent.

18. TERMINATION. Arne's may cancel this agreement, at its option, if VMM defaults in any payment when the same is due. In the event Arne's fails to deliver ore as stated herein, VMM shall give Arne's written notice of such failure to deliver. In the event such default is not thereafter cured within fifteen days from the date of sending written notice to Arne's, VMM may, at its option, cancel this agreement.

18. ENTIRE AGREEMENT. This agreement constitutes the entire agreement between the parties pertaining to the subject matter contained in it and supersedes any prior agreements. No supplement, modification or amendment of this agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar. No such amend-

ment, modification or waiver shall be binding unless executed in writing by the parties. The failure of a party to promptly enforce any right hereunder shall not operate as a waiver of such right, nor shall any waiver constitute a continuing waiver.

20. COUNTERPARTS. This agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

21. ASSIGNMENT. This agreement shall be binding on and shall inure to the benefit of the parties to it and their respective heirs, legal representatives, successors and assigns. It may not be assigned without the express written consent of the parties, which consent shall not be unreasonably withheld.

22. ATTORNEY'S FEES. If any legal action or other proceeding it brought for the enforcement of this agreement, or because of alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this agreement, the successful or prevailing party shall be entitled to recover reasonable attorney's fees, expert witness fees and other costs and expenses incurred in the enforcement of this agreement whether by filing suit or not, in addition to any other relief to which that party may be entitled.

23. SURVIVAL OF REPRESENTATIONS AND WARRANTIES. The

several representations, warranties, indemnities, covenants and agreements of the parties contained in or made pursuant to this agreement shall be deemed to survive the execution hereof and shall be binding upon the parties' successors in interest.

24. FEES OR COMMISSION. The parties agree to indemnify and hold harmless the other from and against any loss, liability, damage, cost, claim or expense incurred by reason of any brokerage, commission or finder's fee alleged to be payable to a finder or broker hired by the indemnifying party.

25. COMMUNICATIONS. All notices, requests, demands and other communications under this agreement shall be in writing and shall either be delivered personally or sent by first-class mail, registered or certified, postage prepaid and properly addressed to a party at his last known address.

26. GOVERNING LAW. This agreement shall be construed in accordance with and governed by the local laws of the State of Utah. Unless the context otherwise requires the terms used herein shall have the same definitions as in U.C.A. §40-8-4, and as defined in the other provisions of the Utah Mined Land Reclamation and Mining Claims Acts.

27. SALE OF BUSINESS. If more than one-third of the common stock of the any party, as presently owned, is sold or conveyed, if any party is merged or consolidated into another company, or if all or substantially all of the property and

assets of VMM are sold, leased, exchanged, mortgaged, pledged or otherwise disposed of not in the usual and regular course of such party's business during the term of this agreement, such party agrees to make as a condition precedent to such transaction an undertaking on the part of such successor to perform the terms of this agreement to the effect that this agreement shall remain in full force and be binding on such successor in accordance with the terms hereof.

28. CESSATION OF BUSINESS. In the event any party ceases business operations, whether by voluntary decision on its part or otherwise, the other party shall be released from further obligations under this agreement and, in the event VMM ceases business operations, Arne's shall be entitled to all payments due hereunder, shall remove its equipment from the Project Area and shall return VMM's equipment to it. Further in the event that VMM or any successor or assign or any entity to whom paragraph 28 is applicable, shall re-initiate mining operations, either directly or indirectly, within ten years from the date of such cessation, in the Project Area, including the area covered by the Right of First Refusal, then this agreement at the option of Arne's shall be in full force and effect as to such renewed mining operations.

IN WITNESS WHEREOF, the parties to this agreement

have duly executed it on the day and year first above written.

ARNE'S AMERICA, INC.

By _____

Its PRESIDENT

VICTORIA MINING AND MILLING COMPANY

By _____

Its Pres.

AMERICAN CONSOLIDATED MINING, INC.

By _____

Its Chairman

As to paragraphs 5 through 10 only:

_____

WINSLOW CADY

_____ INDIVIDUALLY

K/to Victoria Inc

_____

Vice President & Secretary

10-15-85

Tab D

ARNE'S

"AMERICA'S TRAILER - BUILT TO STAY ON THE JOB"

P.O. Box 9223
SALT LAKE CITY, UTAH 84109
(801) 261-0652

GRAVEL TRAILERS
LOW BED TRAILERS
FLAT DECK TRAILERS
END DUMP TRAILERS
BOTTOM DUMP TRAILERS
TRUCK BOXES
CUSTOM MANUFACTURING

AGREEMENT

Arne's America, Inc., (Arne's) agrees to immediately assume complete responsibility for and control of the Victoria Mine, Including all production equipment, facilities, and personnel. Said responsibility shall include, but not be limited to, the hiring and firing of employees; establishing the work schedule; positioning employees according to their experience, knowledge, and capabilities; etc. Involves, America Consolidated Mining (ACM) shall retain general operational authority and control.

In return for the above services, ACM and VMM agree, each and separately, to grant as of this date 2½% of their respective holdings in stock of the Victoria Mining and Milling operation, for a total of 5%, as well as to increase the tonnage rate presently being paid to Arne's under previous contract by $2.00/ton.

Arne's agrees that, for whatever reason, except ore quality, should insufficient profits be generated by 11/1/85 to complete the purchase of Victoria from Hecla Mining, It will invest the sum of $2,000,000.00 to consummate the purchase on that date. Said investment to be collateralized by the assets of the Victoria until such time as Arne's has cleared the debt. Said $2,000,000.00 is not a loan, but an investment which is the total and sole responsibility of Arne's. In return for the $2,000,000.00 investment, ~~ACM and~~ VMM agrees to grant an additional 10% of their stock in VMM ~~each~~, giving Arne's a total interest of ~~25%, with each entity having granted 12½%~~ 15%, said 10% to be pro-rated from the ~~two~~ shares of VMM owned by ~~them~~.

Those signing below have read, understood, and agreed to the terms as stated above:

James D. Sullivan, President
Arne's America, Inc.
9-8-85

William Moeller, Chairman
American Consolidated Mining,
President, Victoria Mining &Milling
9/3/85

Winslow Cady, Vice-President
Victoria Mining and Milling, Inc.
9/12-85

Tab E

AGREEMENT

THIS AGREEMENT is made and entered into as of October 11, 1985, by and among WINSLOW M. CADY and K/D METALS, INC., a Utah corporation, (collectively "Cady"), ARNE'S AMERICA, INC. ("AA"), AMERICAN CONSOLIDATED MINING COMPANY ("ACM"), and VICTORIA MINING & MILLING COMPANY ("VMMC").

RECITALS

A. ACM and VMMC have entered into an Option Agreement dated August 13, 1985 (the "Option Agreement") with Hecla Mining Company ("Hecla"), whereby Hecla has granted the option ("Option") to ACM and VMMC to purchase the Victoria Mill and certain related property and equipment property located near Creery, Elko County, Nevada (the "Victoria Property"). The Option is exercisable for a period of sixty (60) days following the date of the Option Agreement and the purchase price for the Victoria Property (as defined in the Option Agreement) is $2,000,000, less certain amounts previously paid by ACM and VMMC. Copies of the Option Agreement have been provided to AA and Cady.

B. On August 7, 1985, ACM and VMMC entered into an Agreement (the "Nelson Agreement") with Nelson Machinery Company ("Nelson"), whereby ACM and VMMC agreed to purchase Nelson's rights relating to the Victoria Property arising from an Agreement dated April 25, 1979, between Nelson and Day Mines, Inc., Hecla's predecessor in interest.

C. Cady has provided the sum of $75,000, payable to Nelson pursuant to the Option Agreement at the time of execution thereof and has provided certain additional funds for the testing and operation of the Victoria Property from the time that the Option Agreement was entered into until the present date.

D. The parties hereto have decided that it is in their mutual best interest that the Option granted pursuant to the Option Agreement be exercised and that a Joint Venture be entered into by and among them for the acquisition and operation of the Victoria Property.

STATEMENT OF AGREEMENT

In consideration of the premises and the mutual promises and covenants by the parties hereto to one another, the parties hereby represent, warrant, and agree as follows:

1. Formation of Joint Venture. As soon as practical, and in any event prior to the closing for the purchase of the Victoria Property, a joint venture ("Joint Venture") will be formed by VMMC, AA, and Cady for the purpose of acquiring, operating, and developing the Victoria Property, and for such other purposes as may be necessary or appropriate in connection therewith.

2. Interests of Parties. The interests of the parties in the Joint Venture ("Joint Venture Interests") shall be as follows:

VMMC.....	47.5%
Cady.....	47.5%
AA.....	5.0%
Total.....	100.0%

3. Distribution of Cash Flow. The parties shall share and participate in the profits, losses, cash flow and distribution of net assets of the Joint Venture in accordance with their Joint Venture Interests. Until such time as any funds advanced to the Joint Venture by the parties (or by third parties who acquire Joint Venture Interests with the consent of the parties) have been fully repaid to them, cash flow will be distributed in two equal portions on the following basis.

(a) One portion shall be distributed to those Joint Venture Partners making advances to the Joint Venture in proportion to their respective advances, until such time as they have been repaid in full; and

(b) One portion shall be distributed to the parties in accordance with their respective Joint Venture Interests.

After all such advances have been repaid in full, cash flow shall be distributed to the parties in accordance with their Joint Venture Interests. For the purposes of this paragraph 3, it is agreed that the advances of ACM/VMMC are in the amount of $1,200,000 and the advances of Cady are in the amount of $577,000.00

4. Responsibilities of Parties.

(a) Responsibilities of AA. AA will immediately assume complete operational responsibility for, and control

of, the Property, including all production equipment, facilities, and personnel. Said responsibility shall include, but not be limited to, the hiring and firing of employees, establishing the work schedule, positioning employees according to their experience, knowledge, and capabilities, etc.

(b) Responsibilities of VMMC. VMMC shall retain general overall operational authority and control.

(c) Responsibilities of Cady. Except for his participation in regular meetings with representatives of AA and VMMC to discuss the business and operations of the Joint Venture, Cady shall have no operational responsibility. It is understood that he shall have no authority to direct employees or other persons or companies working for or with the Joint Venture in the fulfillment of their duties.

5. Special Compensation to AA. In consideration for its services to be performed pursuant to Paragraph 4(a) above, AA has been granted a 5% Joint Venture Interest which is set forth in Paragraph 2. In addition, the tonnage rate heretofore paid to AA for trucking ore from the Yellow Hammer mining property which belongs to ACM ("Yellow Hammer") to the Victoria Property pursuant to an existing Agreement between AA, ACM and VMMC ("Trucking Agreement"), is increased by $2.00 per ton. As the result of such increase, AA shall no longer be paid a separate bonus of $1.00 per ton based upon tonnage in excess of 1,000 tons per day which is brought to the Victoria Property.

6. Contributions to Joint Venture. The contributions of the parties to the Joint Venture shall be as follows:

(a) By ACM/VMMC. All of their right, title, and interest in and to the Option, the Option Agreement, the Purchase and Sale Agreement in the form of Schedule "C" annexed to the Option Agreement ("Purchase Agreement") and the Nelson Agreement. In addition, ACM/VMMC shall give to the Joint Venture the sole right, without charge, to acquire ore from the Yellow Hammer, including that ore which is found in the extension of ~~that~~ those DS WBM DS WBM certain veins now being worked in the Yellow Hammer. A sketch of the Yellow Hammer is annexed hereto as Exhibit A and made a part hereof. The foregoing agreement to provide ore from the Yellow Hammer shall continue in effect so long as the mill operation at the Victoria Property is in existence and operational.

(b) By Cady. All funds heretofore expended pursuant to and for the purposes of the Option Agreement and for operating and working capital requirements in the operation of the Victoria Property to the date hereof. Cady represents that up to the date hereof it has spent a minimum of $ DS WBM 577,000.00 for such purposes.

7. Working Capital Requirements. The parties recognize that funding will be required for the Joint Venture until such time as there is a positive cash flow from operations. Such funding requirements ("Operating Capital") are expected to be in the maximum sum of $500,000 and will consist of the following:

(a) Amounts required by Hecla as consideration for extending the exercise date for the Option by up to an additional two months.

(b) $85,000 to be paid upon exercise of the Option, of which $75,000 will be payable to Nelson and $10,000 will be payable to Hecla pursuant to Paragraph 9 of the Option Agreement.

(c) Operating expenses of the Victoria Property, including but not limited to payroll and payroll taxes, amounts payable to AA for trucking services; supplies and other expendables purchased from Hecla; title charges; utilities and other appropriate costs and expenses.

It is agreed that if any of the parties hereto (or any outside party mutually acceptable to the parties) shall provide Operating Capital as aforesaid, then, in consideration therefor, the party advancing same shall receive a 10% Joint Venture Interest, which interest will come from the interest of Cady which is set forth in Paragraph 2 hereof. The party providing the Operating Capital shall receive a lien upon the Victoria Property until the amount thereof has been repaid; provided, however, that such lien shall be subordinated and junior to any lien given to a party which provides funding for the purchase of the Victoria Property pursuant to Paragraph 8 hereof. Q & WBM Additional agreements may be issued by the parties for other interest in the project as agreed to by the parties, separately Q & WBM

Purchase Price for Victoria Property.

(a) Funds Required. It is recognized that the total purchase price for the Victoria Property ("Purchase

Money") is $2,000,000, of which some portion, by way of Option money and payment for inventory will have been paid prior to the Closing Date.

(b) Commitment of AA. AA hereby agrees that if, for whatever reason, except quality of the ore in the concentrates, there shall be insufficient funds generated from operations at the Victoria Property by ~~November~~ December 1, 1985, to complete the purchase of the Victoria Property, it will invest the sum of up to $2,000,000 as the Purchase Money to consummate the purchase on that date. Said investment will be collateralized by a first lien on the assets of the Victoria Property until such time as AA has been repaid the amount of such purchase investment. It is recognized that said $2,000,000 is not a loan, but is an investment which shall be the total and sole responsibility of AA. The repayment to AA hereunder shall be made out of cash flow pursuant to Paragraph 3 hereof. After such investment has been repaid to AA, AA will cancel and satisfy its lien upon the Victoria Property. In the event that AA shall be required to invest any sums pursuant to this paragraph for the purchase of the Victoria Property, then it shall receive a 10% interest in the Joint Venture, which amount shall come from the share of Cady therein which is set forth in Paragraph 2 hereof.

(c) Funding by Third Parties. AA agrees that if any of the parties hereto, or any third party agreeable to

the parties hereto, shall provide the commitment and the funding for the purchase of the Victoria Property set forth in this paragraph 8 whereby AA is released from such obligation, then AA shall transfer to such party its right to receive a 10% Joint Venture Interest as set forth herein.

9. Exercise of Option. ACM/VMMC agree that on or before the exercise date for the Option, provided that the Option monies to be provided to them have been duly received, they will give written notice to Hecla of the exercise of the Option pursuant to the Option Agreement and will do such further acts as are required to duly exercise the Option. Moreover, they will fully perform whatever actions are required of them at the time of Closing pursuant to the Purchase Agreement.

10. Assignment of Nelson Agreement. ACM/VMMC agree that at the time of Closing for the purchase of the Victoria Property from Hecla, they will assign and transfer to the Joint Venture all of their right, title, and interest in and to the Nelson Agreement.

11. Assumption of Agreements. The parties agree that the Joint Venture shall assume all of the liabilities, responsibilities, and obligations of ACM and VMMC pursuant to the Option Agreement, the Purchase Agreement, and the Nelson Agreement effective on and as of the Closing Date for the purchase of the Victoria Property. The Joint Venture shall indemnify and hold ACM and VMMC harmless from and against any and all such liabilities, responsibilities, and obligations.

12. Release to Joint Venture. The parties agree that effective as of the Closing Date for the purchase of the Victoria Property, and except as otherwise specifically provided in this Agreement and in the Joint Venture Agreement, the Joint Venture shall be released from any and all claims, obligations, or liabilities to any of the parties hereto.

13. Miscellaneous Matters.

(a) Broker. The parties represent to one another that no broker, finder, or consultant has been involved in the arrangements leading to this transaction, except for Myron B. Child ("Child"). Arrangements for the payment of compensation to Child is set forth in a separate writing between ACM/VMMC and Child.

(b) Expenses. Each party shall pay it own expenses, including attorneys' fees, in connection with the negotiation of this Agreement, the performance of its obligations hereunder, and the consummation of the transactions contemplated by this Agreement. The fees and expenses of Ulmer, Berne, Laronge, Glickman & Curtis relating to the Option Agreement, Purchase Agreement, Nelson Agreement and the Joint Venture Agreement and the consummation and closing thereof shall be borne by the Joint Venture.

(c) Amendment and Waiver. This Agreement may be amended, or any provision of this Agreement may be waived, provided that any such amendment or waiver shall be binding

only if such amendment or waiver is set forth in a writing executed by all parties.

(d) Notices. All notices, demands, and other communications to be given or delivered under or by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been given when personally delivered or when three days have elapsed following such notice, demand, or other communication having been mailed by certified or registered mail, return receipt requested. Notices, demands, and communications to the parties shall, unless another address is specified in writing, as provided herein, be sent to the addresses indicated below:

If to ACM or VMMC:

c/o American Consolidated Mining Company
Attn: William D. Moeller
405 East 100 South
Pleasant Grove, UT 84062

If to AA:

James D. Sullivan, President
Arne's America, Inc.
P.O. Box 9223
Salt Lake City, UT 84109

If to Cady:

Mr. Winslow M. Cady
P.O. Box 203
Los Angeles, CA 90068

Copy to:

Myron B. Child, Jr.
1761 South 900 West
Salt Lake City, UT 84104

(e) Effect of Agreement. This Agreement and all of the provisions hereof shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

(f) Captions. The captions used in this Agreement are for convenience of reference only and do not constitute a part of this Agreement; and the captions shall not be deemed to limit, characterize, or in any way affect any provision of this Agreement.

(g) Entire Agreement. Except as otherwise provided herein, this Agreement and the documents referred to herein contain the complete agreement of the parties, and supersede any other prior understandings, agreements, or representations by or between the parties, whether written or oral, with respect to the subject matter hereof, excluding pre-existing trucking agreements between the parties. It is further understood that the following agreements involving some or all of the parties hereto are hereby terminated so that the parties are released from any and all obligations one to the other pursuant thereto.

(i) Agreement dated July 29, 1985, between VMMC and Cady, as amended; and

(ii) Agreement between the parties appearing on the letterhead of AA which was executed on September 8, 1985 by AA, ACM, and VMMC and on September 12, 1985 by Cady.

(h) Governing Law. The law of the State of Utah shall govern all questions concerning the construction, validity, and interpretation of this Agreement and the performance of the obligations imposed by this Agreement.

(i) Further Assistance and Assurances. Each party hereby agrees that from and after the date hereof, at the other party's reasonable request and without further

consideration, it shall execute and deliver such other instruments of conveyance and transfer and take such other action, as such other party may reasonably require in order to more effectively carry out the true intent and purposes of this Agreement.

(j) Access. The parties shall have reasonable access to the Victoria Property for the purpose of inspecting same and observing activities carried on thereat; but, in so doing shall do no act which interferes with or obstructs the normal operations being carried on in or about the premises.

(k) Funds. All funds to be paid hereunder shall be paid in good and collected funds at Salt Lake City, Utah as of the date of payment.

~~(l) Trucking Agreement. It is agreed that AA shall not haul any ore from the Yellow Hammer to the Victoria Property pursuant to the Trucking Agreement, without first obtaining the consent and approval of ACM/VMMC with respect thereto. It is agreed that if any such ore should be hauled without such consent and approval, then ACM/VMMC shall have no obligation or liability to AA to pay the tonnage and trucking costs therefor.~~

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the date first above written.

AMERICAN CONSOLIDATED MINING COMPANY

By: _____
William D. Moeller
Chairman of the Board

VICTORIA MINING & MILLING COMPANY

By: _____
William D. Moeller
President

ARNE'S AMERICA, INC.

By: _____
James D. Sullivan
President

_____
WINSLOW M. CADY

K/D METALS, INC.

By: _____
Its Secretary

D-056

EXHIBIT A

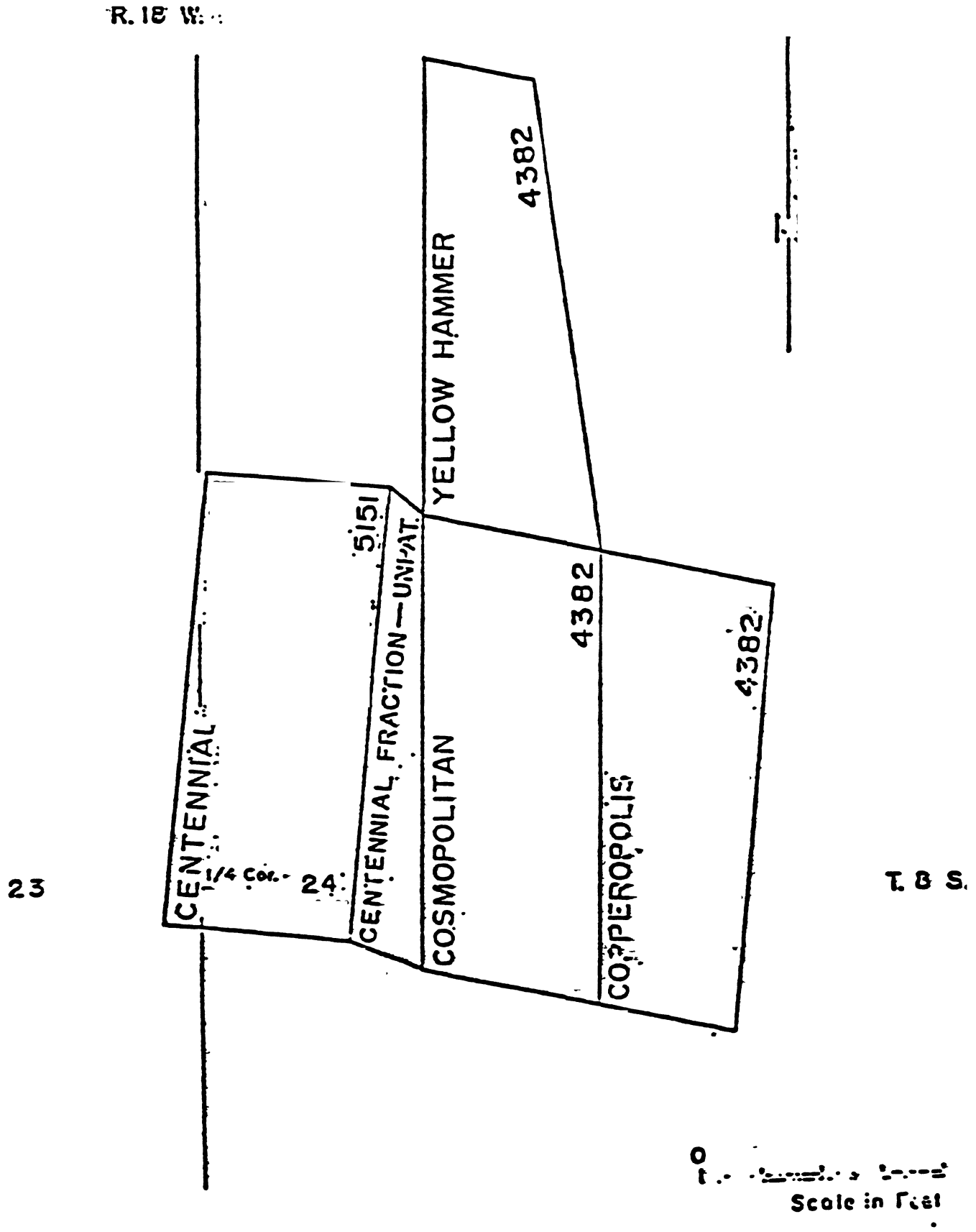
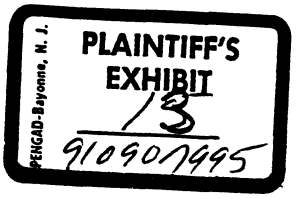


Fig. 2. Claim map of the Yellow Hammer Property.

Tab F



AGREEMENT

THIS AGREEMENT is made and entered into as of November 11, 1985, by and among ARNE'S OF AMERICA, INC. ("AA"), JAMES D. SULLIVAN ("Sullivan") (AA and Sullivan are sometimes herein collectively referred to as "AA Group"), AMERICAN CONSOLIDATED MINING COMPANY ("ACM"), and VICTORIA MINING AND MILLING COMPANY ("VMMC") (ACM and VMMC are sometimes herein collectively referred to as "ACM Group").

RECITALS

A. ACM Group has entered into an Option Agreement dated August 13, 1985 (the "Option Agreement") with Hecla Mining Company ("Hecla"), whereby Hecla has granted the option ("Option") to ACM Group to purchase the Victoria Mill and certain related property and equipment property located near Curry, Elko County, Nevada (the "Victoria Property"). ACM Group has entered into an Extension of Option Agreement dated October 13, 1985 with Hecla (the "Extension Agreement"), whereby upon the payment of certain monies, the exercise date for the Option may be extended until December 13, 1985. The Option Agreement and Extension Agreement are herein sometimes collectively referred to as the "Option Documents."

B. On August 7, 1985, ACM Group entered into an Agreement (the "Nelson Agreement") with Nelson Machinery Company ("Nelson"), whereby ACM Group agreed to purchase Nelson's rights

relating to the Victoria Property arising from an Agreement dated April 25, 1979, between Nelson and Day Mines, Inc., Hecla's predecessor in interest.

C. AA and ACM Group entered into a certain Agreement dated October 11, 1985 (the "October 11 Agreement"), setting forth certain understandings with respect to the Victoria Property The October 11 Agreement was also prepared for signature by Winslow M. Cady and K/D Metals, Inc. (collectively "Cady"), but has not been fully executed by Cady.

D. AA Group, as Buyer, Cady, as Seller, and Myron B. Child, Jr. ("Child") entered into a Stock Purchase Agreement dated November 5, 1985 (the "Stock Purchase Agreement"), whereby Cady sold their interest in the Victoria Property, VMMC, and certain related assets to AA Group.

E. VMMC and RIHT Capital Corporation ("RIHT") entered into an Investment Agreement dated November 8, 1985 (the "RIHT Agreement"), whereby RIHT has agreed to loan the sum of $500,000 to VMMC for purposes of providing operating capital for the Victoria Property (the "RIHT Loan"), and RIHT has agreed to acquire 100 shares of common stock of VMMC (approximately 9.5% of the outstanding). Closing for the RIHT Loan ("RIHT Loan Closing") subject to the satisfaction of certain conditions, is scheduled to occur on November 13, 1985.

F. The parties have determined that it is in their mutual best interest that the Option granted pursuant to the Option Documents be exercised, that the RIHT Loan be closed, and

that the parties, together with other individuals who have made or who hereafter may make a financial investment in the Victoria Property ("Outside Investors"), enter into either a joint venture agreement or a limited partnership agreement ("Business Agreement") whereby a business entity ("Business Entity") will be formed for the acquisition and operation of the Victoria Property and the business to be conducted thereat.

STATEMENT OF AGREEMENT

In consideration of the premises and the mutual promises and covenants by the parties hereto to one another, the parties hereby represent, warrant and agree as follows:

1. Formation of Business Entity. As soon as practical, and in any event prior to the closing for the purchase of the Victoria Property (the "Property Closing"), the Business Entity will be formed by VMMC, AA Group and the Outside Investors for the purpose of acquiring, operating and developing the Victoria Property, and for such other purposes as may be necessary or appropriate in connection therewith. If the Business Entity is a limited partnership, VMMC and AA will be the general partners. If the parties hereto and the Outside Investors determine not to enter into a Business Agreement, then VMMC shall be the Business Entity.

2. Equity Interests. The interests (whether stock or otherwise) of the parties hereto and the Outside Investors in the

Business Entity ("Equity Interests"), as of the date hereof and as the same will be adjusted at the RIHT Loan Closing, are as follows:

Party	Present Equity Interest	Adjustment	Adjusted Equity Interest
VMMC	47.5%	+ 5.0%	52.5%
AA Group	41.5%	- 5.0%	36.5%
Douglas Marriott	5.0%	---	5.0%
Ed McLaughlin	6.0%	---	6.0%
Total:	100.0%		100.0%

The adjustments hereinabove referred to are in consideration of the RIHT Loan to VMMC which is described in Paragraph 8 hereof. It is further understood that in the event that a group or individual ("Funding Source") provides funds necessary for the purchase of the Victoria Property, then the Funding Source shall be entitled to a 10% Equity Interest, which Equity Interest shall be provided to it by AA Group from the Equity Interest it purchased from Cady. It is further understood that if the Funding Source is provided or arranged for by RIHT or by ACM Group, then the 10% Equity Interest, to the extent that the same shall not be required by the Funding Source, shall be transferred to RIHT or to ACM Group, as the case may be, or to their nominee.

3. Stock Purchase Agreement. AA Group represents to ACM Group that it has closed the purchase of the Cady Equity Interest in the Victoria Property pursuant to the Stock Purchase Agreement, and that any obligations and responsibilities set

forth in the Stock Purchase Agreement to be performed by AA Group shall be performed solely by AA Group, and ACM Group shall have no responsibility therefor. It is understood, however, that pursuant to the Stock Purchase Agreement, Cady has reserved a 6% overriding interest in certain profits of the Business Entity, all of which shall be the sole responsibility of AA Group. AA Group agrees to indemnify and hold ACM Group harmless from and against any loss, liability, costs or expenses arising pursuant to, or as a result of, the Stock Purchase Agreement.

4. Distribution of Cash Flow. The holders of the Equity Interests in the Business Entity shall share and participate in the profits, losses, cash flow and distribution of net assets of the Business Entity, in accordance with their respective Equity Interests. Until such time as any funds advanced to or for the benefit of the Business Entity by the parties or by the Outside Investors have been fully repaid to them, cash flow will be distributed in two equal portions on the following basis:

(a) One portion shall be distributed to those holders of Equity Interests making advances to or for the benefit of the Business Entity, in proportion to their respective advances, until such time as such advances have been repaid in full; and

(b) One portion shall be distributed to the holders of Equity Interests in accordance with their respective Equity Interests.

After all such advances have been repaid in full, cash flow shall be distributed to the holders of Equity Interests in accordance with their respective Equity Interests. For the purposes of this Paragraph 4, it is agreed that the advances of ACM Group, solely by virtue of their contribution of ore in the Yellow Hammer Mining Property ("Yellow Hammer"), are in the amount of $1,200,000.

5. Responsibilities of Parties.

(a) Responsibilities of AA. AA shall have complete operational responsibility for, and control of, the Victoria Property, including all production equipment, facilities and personnel. Said responsibility shall include, but not be limited to, the hiring and firing of employees, establishing the work schedule, positioning employees according to their experience, knowledge and capabilities, etc.

(b) Responsibilities of VMMC. VMMC shall retain general overall operational authority and control.

6. Special Compensation to AA. In consideration for its services to be performed pursuant to Paragraph 5(a) above, AA has been granted a 5% Equity Interest which is included within the AA Group Equity Interest described in Paragraph 2 above. In addition, the tonnage rate heretofore paid to AA for trucking ore from the Yellow Hammer to the Victoria Property pursuant to an existing Trucking Agreement dated September 1, 1985 ("Trucking Agreement"), is increased by $2.00 per ton. As the result of such increase, AA shall no longer be paid a separate bonus of

$1.00 per ton based upon tonnage in excess of 1,000 tons per day which is brought to the Victoria Property.

7. Contribution of ACM Group. ACM Group shall contribute to the Business Entity the following:

(a) All of its right, title and interest in and to the Option, the Option Documents, the Purchase and Sale Agreement in the form of Schedule "C" annexed to the Option Agreement ("Purchase Agreement"), and the Nelson Agreement.

(b) The sole right, without charge, to acquire ore from the Yellow Hammer, including that ore which is found in the extension of those certain veins now being worked in the Yellow Hammer. A sketch of the Yellow Hammer is annexed hereto as Exhibit A and made a part hereof. The within agreement to provide ore from the Yellow Hammer shall continue in effect so long as the milling operation at the Victoria Property is in existence and is operational.

8. Working Capital to be Provided by RIHT Loan.

(a) The proceeds of the RIHT Loan, subject to the closing thereof, shall be utilized to provide operating expenses for the Victoria Property, such as payroll and payroll taxes; amounts payable to AA for trucking services rendered after the closing date for the RIHT Loan; supplies, chemicals and other expendibles purchased from Hecla and third parties; title charges; utilities; professional expenses; and other operating costs and expenses. In addition, such proceeds may be used to provide the $25,000

consideration payable to Hecla for the second extension of the Option pursuant to the Option Documents, subject to repayment as provided in Paragraph 8(b) below.

(b) As consideration for the RIHT Loan, RIHT shall receive 100 shares of common stock of VMMC as provided in Recital E hereof. As security for the RIHT Loan, RIHT shall receive a security interest in the Option Documents, and a security interest in the ore, concentrates, by-products thereof, work and material in process at the Victoria Property, and proceeds of the sale thereof, including accounts receivable from customers generated therefrom. Upon the purchase by ACM Group of the Victoria Property pursuant to the Option Documents, ACM Group and the Business Entity as its successor in interest shall grant to RIHT a mortgage lien upon the Victoria Property and a security interest in the equipment. Such security interest and mortgage lien shall be subordinated and junior to any security interest or mortgage granted to a Funding Source for the purchase of the Victoria Property pursuant to Paragraph 9 hereof. The funds advanced by VMMC from the RIHT Loan which apply towards the purchase price of the Victoria Property shall be reimbursed to VMMC from the funding provided by AA Group or any such Funding Source.

9. Purchase Price for Victoria Property.

(a) Funds Required. It is recognized that the total purchase price for the Victoria Property ("Purchase Money") is $2,000,0000, of which some portion, by way of Option money and payment for inventory and supplies, will have been paid prior to the Closing Date.

(b) Commitment of AA. AA hereby agrees that if, for whatever reason, except quality of the ore in the concentrates, there shall be insufficient funds generated from operations at the Victoria Property by December 1, 1985, to complete the purchase of the Victoria Property, it will invest the sum of up to $2,000,000 as the Purchase Money to consummate the purchase on that date. Said investment will be collateralized by a first lien and mortgage lien on the assets of the Victoria Property until such time as AA has been repaid the amount of the Purchase Money. It is recognized that said $2,000,000 is not a loan, but is an investment which shall be the total and sole responsibility of AA. The repayment to AA hereunder shall be made out of cash flow pursuant to Paragraph 4 hereof. After such investment has been repaid to AA, AA will cancel and satisfy its lien upon the Victoria Property.

(c) Funding by Third Parties. AA Group agrees that if ACM Group, or any Funding Source agreeable to the parties hereto shall provide the commitment and the funding for the purchase of the Victoria Property set forth in this

Paragraph 9 whereby AA is released from such obligation, then AA Group shall transfer to such party a 10% Equity Interest as set forth herein. The Funding Source shall also have the first lien described in Paragraph 9(b) hereof.

10. Exercise of Option. ACM Group agrees that on or before the exercise date for the Option, provided that the Option monies to be provided to it have been duly received, it will give written notice to Hecla of the exercise of the Option pursuant to the Option Documents and will do such further acts as are required to duly exercise the Option. Moreover, it will fully perform whatever actions are required of it at the time of the Property Closing. Title to the Victoria Property will be taken in the name of the Business Entity.

11. Assignment of Nelson Agreement. ACM Group agrees that at the time of the Property Closing, it will assign and transfer to the Business Entity all of its right, title, and interest in and to the Nelson Agreement.

12. Assumption of Agreements. The parties agree that the Business Entity shall assume all of the liabilities, responsibilities, and obligations of ACM Group pursuant to the Option Documents, the Purchase Agreement, and the Nelson Agreement effective on and as of the date for the Property Closing. The Business Entity shall indemnify and hold ACM Group harmless from and against any and all such liabilities, responsibilities, and obligations.

13. Release to Business Entity. The parties agree that effective as of the date for the Property Closing, and except as otherwise specifically provided in this Agreement and in the Business Agreement, the Business Entity shall be released from any and all claims, obligations, or liabilities to any of the parties hereto except for obligations pursuant to this Trucking Agreement

14. Miscellaneous Matters.

(a) Broker. The parties represent to one another that no broker, finder, or consultant has been involved in the arrangements leading to this transaction, except for Child. Arrangements for the payment of compensation to Child are set forth in a separate writing between ACM Group and Child.

(b) Expenses. Each party shall pay it own expenses, including attorneys' fees, in connection with the negotiation of this Agreement, the performance of its obligations hereunder, and the consummation of the transactions contemplated by this Agreement. The fees and expenses of Ulmer, Berne, Laronge, Glickman & Curtis relating to the Option Document, Purchase Agreement, Nelson Agreement, the Property Closing and the Business Agreement and the consummation and closing thereof shall be borne by the Business Entity.

(c) Amendment and Waiver. This Agreement may be amended, or any provision of this Agreement may be waived, provided that any such amendment or waiver shall be binding

only if such amendment or waiver is set forth in a writing executed by all parties.

(d) Notices. All notices, demands, and other communications to be given or delivered under or by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been given when personally delivered or when three days have elapsed following such notice, demand, or other communication having been mailed by certified or registered mail, return receipt requested. Notices, demands, and communications to the parties shall, unless another address is specified in writing, as provided herein, be sent to the addresses indicated below:

If to ACM Group:

c/o American Consolidated Mining Company
Attn: William D. Moeller
405 East 100 South
Pleasant Grove, Utah 84062

If to AA Group:

James D. Sullivan, President
Arne's America, Inc.
P.O. Box 9223
Salt Lake City, Utah 84109

(e) Effect of Agreement. This Agreement and all of the provisions hereof shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

(f) Captions. The captions used in this Agreement are for convenience of reference only and do not constitute a part of this Agreement; and the captions shall

not be deemed to limit, characterize, or in any way affect any provision of this Agreement.

(g) Entire Agreement. Except as otherwise provided herein, this Agreement and the documents referred to herein contain the complete agreement of the parties, and supersede any other prior understandings, agreements, or representations by or between the parties, whether written or oral, with respect to the subject matter hereof, excluding the Trucking Agreement. It is further understood that the following Agreements involving some or all of the parties hereto are hereby terminated so that the parties are released from any and all obligations one to the other pursuant thereto.

(i) Agreement dated July 29, 1985, between VMMC and Cady, as amended;

(ii) Agreement between the parties appearing on the letterhead of AA which was executed on September 8, 1985 by AA, ACM, and VMMC and on September 12, 1985 by Cady; and

(iii) October 11 Agreement.

(h) Governing Law. The law of the State of Utah shall govern all questions concerning the construction, validity, and interpretation of this Agreement and the performance of the obligations imposed by this Agreement.

(i) Further Assistance and Assurances. Each party hereby agrees that from and after the date hereof, at the other party's reasonable request and without further consideration, it shall execute and deliver such other

instruments of conveyance and transfer and take such other action, as such other party may reasonably require in order to more effectively carry out the true intent and purposes of this Agreement.

(j) Access. The parties shall have reasonable access to the Victoria Property for the purpose of inspecting same and observing activities carried on thereat; but, in so doing shall do no act which interferes with or obstructs the normal operations being carried on in or about the premises.

(k) Funds. All funds to be paid hereunder shall be paid in good and collected funds at Salt Lake City, Utah as of the date of payment.

(l) Equity Interests in the Form of VMMC Stock. Prior to the Property Closing, AA Group shall determine whether the Business Entity shall be VMMC. In the event that it shall make such determination, then AA Group shall forthwith advise ACM Group in writing and thereupon AA Group and the Outside Investors shall be issued shares of VMMC stock in respect of their Equity Interests. AA Group shall be issued a total of 730 shares (allocated among them as they shall designate to VMMC), and Outside Investors shall receive a total of 220 shares (120 shares to Ed McLaughlin and 100 shares to Douglas Marriott). It is understood that pursuant to the RIHT Agreement, a copy of which has been provided to AA Group, all shareholders of VMMC, including AA

Group and the Outside Investors, as a condition of receiving their shares, are obligated to enter into a Security Holders' Agreement in the form of Exhibit B to the RIHT Agreement. ACM and RIHT have already entered into such Security Holders' Agreement and AA Group agree that they will likewise do so simultaneously with the issuance to them of their VMMC shares. As an incident to the issuance of said shares, VMMC has made to AA Group the representations set forth in Exhibit B annexed hereto and made a part hereof.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the date first above written.

AMERICAN CONSOLIDATED MINING COMPANY

By: _____
William D. Moeller
Chairman of the Board

VICTORIA MINING & MILLING COMPANY

By: _____
William D. Moeller
President

ARNE'S AMERICA, INC.

By: _____
James D. Sullivan
President

_____
JAMES D. SULLIVAN,
Individually

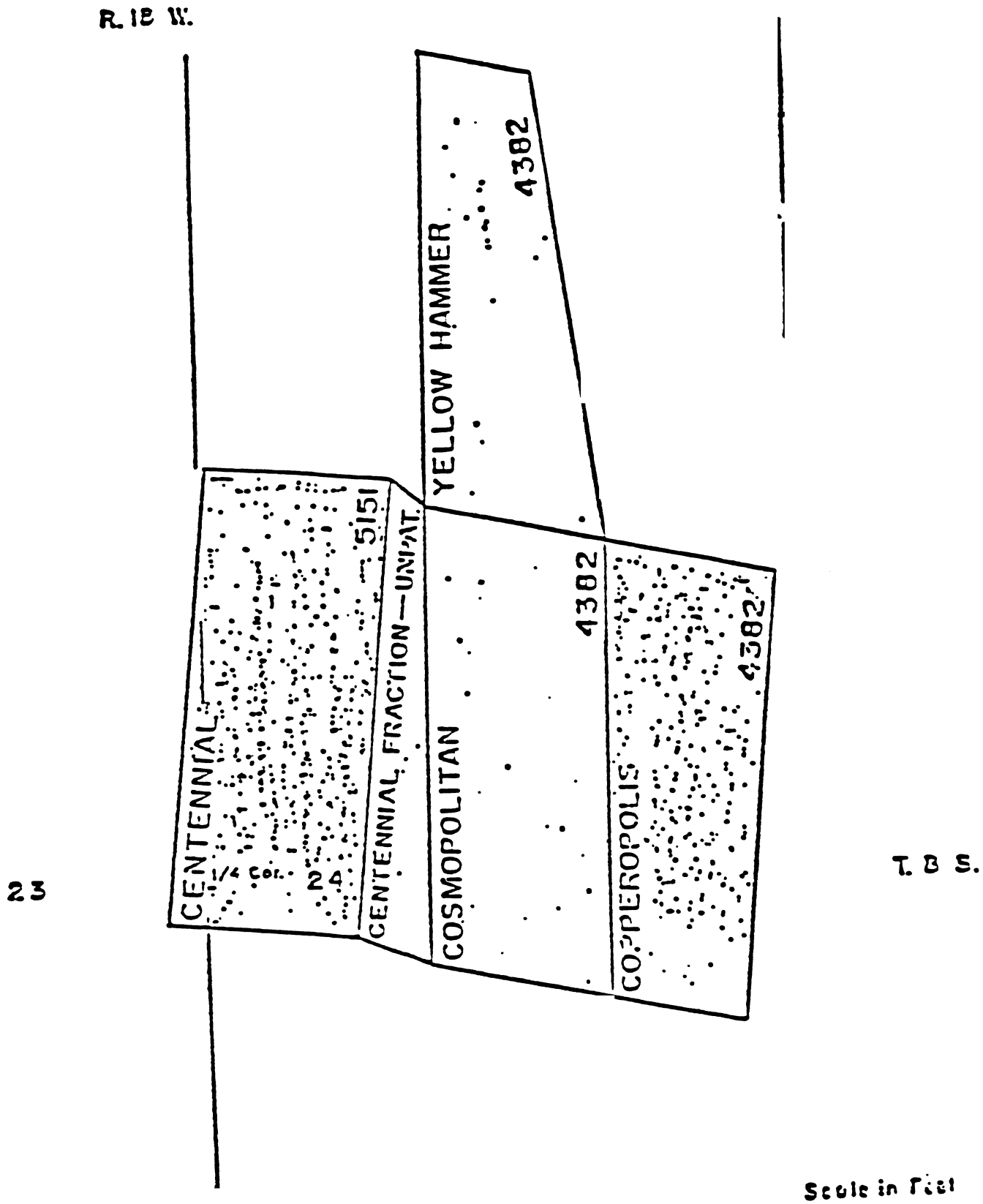


Fig. 2. Claim map of the Yellow Hammer Property.

PROPERTY

The property consists of four patented claims known as Copperopolis, Centennial, Cosmopolitan and Yellow Hammer and one unpatented fraction known as Centennial Fraction. They are located at approximately 40° 7' latitude, 113° 49' longitude.

ACCESS

The property is accessible by highway 80 west from Salt Lake City 122 miles then some 30 miles south on highway alt.#50, then some 30 miles southeast on a dirt road to Gold Hill. The property is some 5 miles south of Gold Hill.

GENERAL GEOLOGY

The property is underlain mostly by quartz monzonite of Tertiary age which has intruded the Ochre Mountain limestones of Mississippian Age.

REFERENCE.

The following reductions are parts of reports referred to:

EXHIBIT B

The authorized capital stock of VMMC consists of 2,500 shares of common stock having no par value, of which 1,050 shares are issued and outstanding. Pursuant to the provisions of the Agreement to which this Exhibit B is annexed (the "Agreement"), a total of 950 additional shares of common stock of VMMC will be issued to AA Group and the Outside Investors, resulting in a total of 2,000 shares of VMMC being issued and outstanding. This will leave a total of 500 authorized but unissued shares available for future issuance upon proper action by the Board of Directors of VMMC. All of said issued and outstanding shares are validly issued, fully paid and nonassessable. There are no outstanding subscriptions, options, rights, warrants, convertible securities or other agreements or commitments obligating VMMC to issue or to transfer any additional shares of its capital stock, except as provided in the Agreement.

From November 11, 1985 to the Property Closing, VMMC has not and will not cause or make any:

(i) sale or transfer of any material asset of VMMC, except in the ordinary course of business;

(ii) issue or create any warrants, obligations, subscriptions, options, convertible securities or other commitments under which additional shares of its capital stock might be directly or indirectly authorized, issued or transferred from treasury;

(iii) declare, set aside or pay any dividend or make any distribution in respect of its capital stock;

(iv) directly or indirectly purchase, redeem or otherwise acquire any shares of its capital stock;

(v) directly or indirectly issue, pledge or sell any shares of its stock, or of any other of its securities, or purchase any of its own stock;

(vi) make any amendment to its Articles of Incorporation or Bylaws.

Tab G

ARNE'S

"AMERICA'S TRAILER - BUILT TO STAY ON THE JOB"

P.O. Box 9223
SALT LAKE CITY, UTAH 84109
(801) 261-0652

GRAVEL TRAILERS
LOW BED TRAILERS
FLAT DECK TRAILERS
END DUMP TRAILERS
BOTTOM DUMP TRAILERS
TRUCK BOXES
CUSTOM MANUFACTURING

AGREEMENT

December 12, 1985

As the original extension to the option agreement between Victoria Mining and Milling Company (VMMC) and Heckla Mining is scheduled to expire on December 13, 1985, and, as VMMC does not presently have the cash assets to meet the requirements of a second extension agreed to by Heckla in the amount of $144,270.00, Arne's America (Arne's) has agreed to provide that amount to Heckla not later than close of business on December 13, 1985, such that said funds can be wired to Heckla on that date. This extension shall give VMMC the right to purchase the Victoria Mine and Mill through January 31, 1985.

To induce Arne's to participate in this extension in the aforesaid manner, VMMC and American Consolidated Mining (ACM) agree to grant Arne's 7 1/2% additional ownership of the Victoria Mill Project to include 7 1/2% of the profits to be shared, said percentage to be provided from the previously defined Winslow M. Cady portion of the Project. This percentage is provided pursuant to the Agreement between American Consolidated Mining and Winslow M. Cady dated July 29, 1985, which states in Paragraph 2, Page 2, "If ownership interest must be given to lenders to induce said lenders to make any agreed upon loan, then Cady hereby agrees to promptly assign, sell and transfer his ownership interest as needed and not impose upon the interest of VMMC."

William D. Moeller, Chairman, American Consolidated Mining and President, Victoria Mining and Milling

James D. Sullivan, President, Arne's America

Tab H

ARNE'S

"AMERICA'S TRAILER - BUILT TO STAY ON THE JOB"

P.O. Box 9223
SALT LAKE CITY, UTAH 84109
(801) 261-0652

December 13, 1985

GRAVEL TRAILERS
LOW BED TRAILERS
FLAT DECK TRAILERS
END DUMP TRAILERS
BOTTOM DUMP TRAILERS
TRUCK BOXES
CUSTOM MANUFACTURING

GUARANTY AGREEMENT

In order to induce Arne's America, Inc, (Arne's) to advance the sum of $144,270.00 to Victoria Mining and Milling Company (VMMC) for either the exercise of their option to purchase or the extension of their option to purchase the Victoria Mine from Heckla Mining, the undersigned Guarantor agrees, absolutely and unconditionally, should VMMC be unable to repay said advance within 30 *days of this date for whatever reason, to personally guarantee* and accept responsibility for the repayment to Arne's of the $144,270.00 utilizing his personal and corporate assets including, but not limited to cash, real estate, stock holdings, personal property, etc, immediately upon the default of VMMC in this matter. Said Guarantor agrees that this guaranty shall remain in full force and effect as to any renewal, modification, or extension whatever, whether or not Guarantor receives notice of same. Guarantor further agrees that their liability shall be primary and that Arne's may proceed against Guarantor and VMMC jointly or separately. If Guarantor or VMMC should default in performance required herein, then Arne's costs, attorney fees, and expert witness fees shall be paid by VMMC or Guarantor. This Agreement shall also be binding on and shall inure to the benefit of the parties to it and their respective heirs, legal representatives, successors and assigns. Guarantor also agrees to indemnify Arne's from its commitment to provide up to $2,000,000 for the purchase of mill assets as provided in previous agreements. Additionally, first proceeds from the sale of any products of ~~this~~ VMMC shall be committed to repayment this advance DDS

WITNESSED BY:

GUARANTOR:

PRESIDENT, VMMC

DATE: 12/13/85

DATE: 12/13/85

Tab I

D-19

Ulmer, Berne, Laronge, Glickman & Curtis

Attorneys at Law

900 Bond Court Building

East Ninth Street at St. Clair Avenue

Cleveland, Ohio 44114-1583

(216) 621-8400

Telex
980131 WDMR

Telecopier
(216) 621-7488

January 2, 1986

Mr. James D. Sullivan
President
Arne's of America, Inc.
6100 South 300 East
Salt Lake City, Utah 84107

Dear Don:

I have finally done a redraft of the November 11, 1985 Agreement among Arne's VMMC, ACM, et al., picking up substantially all of the changes reflected in your redraft of that document as sent to me under cover letter dated November 22, 1985. I did modify some of the language suggested by you, and am confident you will have no objection to my "creativity" in this regard.

I am therefore herewith enclosing four execution copies of the November 11 Agreement, together with an extra copy which has been marked to show the changes from my prior draft. Please sign this document individually where called for and also sign on behalf of Arne's. Then please deliver all copies to Bill Moeller for signature on behalf of VMMC and ACM. After Bill has signed, you each should retain one fully-executed set and two fully-executed copies should be returned to me. I will then provide RIHT Capital Corporation with a fully-executed document.

With best wishes for achievement and success in 1986,

Sincerely,

Morton L. Stone

43:1a
Enc.

cc: Mr. William D. Moeller
Mr. Philip M. Lynch

Tab J

WHEN RECORDED, MAIL TO:

✓ WINDER & HASLAM

175 West 200 South, #4004

Salt Lake City, Utah 84101

BOOK 238

372124

PAGE 31-32

Space Above for Recorder's Use

EN ____ PT ____ AE ____

S-270

RECORDED AT REQUEST OF Winder & Haslam

1986 MAR 21 PM 1:11

DONNA S. McKENDRICK
TOOELE COUNTY RECORDER

DEPUTY ____ FEE 7.50

AMENDED

NOTICE OF LIEN

The undersigned Arne's America

hereby give.. notice of intention to hold and claim a lien upon the property and improvements thereon owned and reputed to be owned by American Consolidated Mining Company and Victoria Mining and Milling Company and located in Tooele County, Utah, more particularly described as follows:

Claims located in the Clifton Mining District, Tooele County, State of Utah:

Centennial	Claim Number 5151
Cosmopolitan	Claim Number 4382
Copperapolis	Claim Number 4382
Yellow Hammer	Claim Number 4382

PLAINTIFF'S EXHIBIT 17 910907995 PENGAD-Bayonne, N. J.

The amount demanded hereby is $883,679.41 plus** owing to the undersigned for *furnishing materials used in *performing labor upon the ~~*construction *alteration *addition to *repair of a *building *structure *improvement upon the~~ above described property.

The undersigned *furnished said materials to *was employed by American Consolidated Mining Company and Victoria Mining and Milling Company, who were ~~was~~ the reputed owners of the claim(s), such being done by the undersigned under a contract made between American Consolidated Mining Company and Victoria Mining and Milling Company and the undersigned by the terms and conditions of which the undersigned did agree to operate a mining operation, remove existing overburden, crush ore to a maximum of 8 inches and transport the ore to the mill site at Victoria Mine.

in consideration of payment to the undersigned therefore as follows: the sum of $12.25 per ton of ore delivered to the mill site, subject to the adjustment annually based on the Consumer Price Index,

and under which contract the first *material was furnished and labor was performed on the 1st day of September, 19 85 and the last was so furnished or performed on the 3rd day of January, 19 86, and for all of which *materials *labor the undersigned became entitled to $883,679.41 plus**, which is the reasonable value thereof, and on which payments have been made and credits and offsets allowed amounting to $.00 leaving a balance owing to the undersigned of $883,679.41 plus** after deducting all just credits and offsets, and for which demand the undersigned hold.. and claim.. a lien by virtue of the provisions of Chapter 1, Title 38, Utah Code Annotated 1953.

DATED this 18th day of March, 1986.

ARNE'S AMERICA

BY James D. Sullivan, President

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**interest thereon as provided by contract dated September 1, 1985.

*Strike out unnecessary words

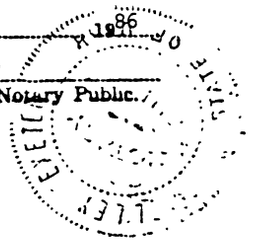
FORM 405—NOTICE OF LIEN—KELLY CO. 55 W. NINTH SOUTH S.L.C. UTAH

STATE OF UTAH,
County of Salt Lake } ss.

James D. Sullivan being first duly sworn, says that he is President of claimant in the foregoing Notice of Lien; that he has read said notice and knows the contents thereof, and that the same is true of his own knowledge.

Subscribed and sworn to before me this 18th day of March 1986

Shelley Foster
Notary Public.



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Tab K

D-211

DEFENDANT'S EXHIBIT

A

ARNE'S AMERICA INC

P O Box 9223, Salt Lake City, Utah, 84109

INVOICE NUMBER: AA 10365	DATE: 3-24-86	TYPE OF INVOICE: ☐ Product ■ Part ☐ Service ☐ Publication	
MODEL / PART / PUBLICATION NO: N/A	VEHICLE IDENTIFICATION NUMBER: N/A	PROD /DEL DATE: NUMEROUS (attchd)	
QUANTITY: SEE BELOW	TYPE OF ORDER: ■ Retail ☐ Stock ☐ Government ☐ Fleet	SALES CODE: N/A	
DEALER/CUSTOMER: VICTORIA MINING AND MILLING	DEALER /CUSTOMER ADDRESS: 233 S 3900 E, SLC, 84107		
DELIVERY ADDRESS (IF DIFFERENT FROM DEALER): VICTORIA MINE, NEVADA	PARTS CODE: N/A		

YMMC PO #5765: 1 BARREL 10 WT OIL, 1 BARREL 15/40, 400 LBS 90 WT GEAR LUBE, 1 BARREL SOLVENT, 6 DRUMS	$ 774.90
YMMC PO # 5764: 2500 GALS REGULAR GASOLINE @ $1.219	3,047.90
ARNE'S PO #092 FOR YMMC: 1 OIL FILTER, 6 FUEL FILTERS (inc tax)	30.89
YMMC PO #1202: 12 WIX FILTERS, 2" X 20' CABLE (inc tax)	97.56
NOTE: SEND PAYMENT TO - ARNE'S AMERICA, INC. PO BOX 9223 SALT LAKE CITY, UTAH 84109	
SUBTOTAL	$3,951.25
EXCISE TAX Federal	
State / Provincial	
ADVERTISING FUND	
FREIGHT	
MISCELLANEOUS	
TOTAL	$3,951.25
LESS Industry Equivalency Adjustment (IEA)	
Government Price Concession	
Pre-Paid Deposit	
BALANCE DUE	$3,951.25

TYPE OF PAYMENT: ■ Check ☐ Draft	FINANCE SOURCE: DeNiro and Thorne	ACCOUNT NUMBER: YMM-100
TERMS OF PAYMENT: ■ Due on Delivery ☐ Net Plus _____ Days	PLANT OF MANUFACTURE: N/A	

ARNE'S
AMERICA INC

B

P O Box 9223, Salt Lake City, Utah, 84109

INVOICE NUMBER	DATE	TYPE OF INVOICE	
AA 10364	2/19/86	☐ Product ■ Part	☐ Service ☐ Publication

MODEL / PART / PUBLICATION NO	VEHICLE IDENTIFICATION NUMBER	PROD./DEL. DATE
N/A	N/A	SEE BELOW

QUANTITY	TYPE OF ORDER	SALES CODE
N/A	■ Retail ☐ Stock ☐ Government ☐ Fleet	N/A

DEALER/CUSTOMER	DEALER/CUSTOMER ADDRESS
VICTORIA MINING AND MILLING	233 EAST 3900 SOUTH, SLC

DELIVERY ADDRESS (IF DIFFERENT FROM DEALER)	PARTS CODE
VICTORIA MINE, NEVADDA	N/A

AXLE SEAL: Rick Warner Ford; YMM PO#5768	$ 8.02
NUMEROUS: Six States Dist; YMM PO#5773 (Ford P/U)	270.92
PETROLEUM PRODUCTS: DalSoglio Dist; YMM PO#5771	231.60
GREASE: DalSoglio Dist; YMM PO#5770	30.35
NUMEROUS: DalSoglio Dist; YMM PO#1213	636.30
BULBS: Hafers Inc; YMM PO#5769	18.00
(Copies of Invoice Attached)	
NOTE: SEND PAYMENT TO - ARNE'S AMERICA, INC.	
PO BOX 9223	
SALT LAKE CITY, UTAH 84109	
SUBTOTAL	$1195.19
EXCISE TAX Federal	
State / Provincial	$ 68.72
ADVERTISING FUND	
FREIGHT	
MISCELLANEOUS	
TOTAL	$1263.91
LESS.	
Industry Equivalency Adjustment (IEA)	
Government Price Concession	
Pre-Paid Deposit	
BALANCE DUE	$1263.91

TYPE OF PAYMENT	FINANCE SOURCE	ACCOUNT NUMBER
■ Check ☐ Draft	DeNiro & Thorne	YMM-100

TERMS OF PAYMENT	PLANT OF MANUFACTURE
■ Due on delivery ☐ Net Plus _____ Days	N/A

C

ARNE'S
AMERICA INC

P O Box 9223 Salt Lake City, Utah 84109

INVOICE NUMBER	DATE	TYPE OF INVOICE	
AA10363	2-3-86	☐ Product ☐ Part	☒ Service ☐ Publication

MODEL PART	PUBLICATION NO	VEHICLE IDENTIFICATION NUMBER	PROD./DEL. DATE
N/A		N/A	SEE BELOW

QUANTITY	TYPE OF ORDER	SALES CODE
SEE BELOW	☒ Retail ☐ Stock ☐ Government ☐ Fleet	N/A

DEALER/CUSTOMER	DEALER/CUSTOMER ADDRESS
VICTORIA MINING AND MILLING CO.	233 EAST 3900 SOUTH, SLC, UTAH

DELIVERY ADDRESS (IF DIFFERENT FROM DEALER)	PARTS CODE
YELLOW HAMMER MINE, VICINITY GOLD HILL, UTAH	N/A

STAND-BY ON-SITE FOR THE MONTH OF JANUARY, 1986, WITH ALL NECESSARY EQUIPMENT FOR THE MINING AND HAULING OF ORE OUT OF THE YELLOW HAMMER MINE @ $3,500.00 PER DAY	$108,500.00

NOTE. SEND PAYMENT TO - ARNE'S AMERICA, INC.
PO BOX 9223
SALT LAKE CITY, UTAH 84109

SUBTOTAL	$ 108,500.00
INVOICE TAX Federal	
State Special	
ADVERTISING FUND	
FREIGHT	
MISCELLANEOUS	
TOTAL	$ 108,500.00
LESS Industry Equivalency Adjustment (IEA)	
Government Price Concession	
Pre-Paid Deposit	
BALANCE DUE	$ 108,500.00

TYPE OF PAYMENT	FINANCE SOURCE	ACCOUNT NUMBER
☒ Check ☐ Draft	DENIRO & THORNE	YMM-100

TERMS OF PAYMENT	PLANT OF MANUFACTURE
☒ Due on delivery ☐ Net Plus _____ Days	N/A

ARNE'S America Inc AA 114 Gen [illegible]

D

ARNE'S AMERICA INC

P.O. Box [illegible] Salt Lake City, Utah 84109

INVOICE NUMBER	DATE	TYPE OF INVOICE
[illegible]01	1-2-86	☒ Service ☐ Product ☐ Parts ☐ Rebuild/Exchange

MODEL	PUBLICATION NO	VEHICLE IDENTIFICATION NUMBER	PROD. DEL. DATE
N/A		N/A	DECEMBER/VARIOUS

QUANTITY	TYPE OF ORDER	SALES CODE
SEE BELOW	☒ Retail ☐ Stock ☐ Government ☐ Fleet	N/A

DEALER/CUSTOMER	DEALER/CUSTOMER ADDRESS
VICTORIA MINING AND MILLING	235 EAST 3900 SOUTH, SLC, UTAH

DELIVERY ADDRESS (IF DIFFERENT FROM DEALER)	PARTS CODE
VICTORY MINE, NEVADA	N/A

DECEMBER TONNAGE 10,573.36 TONS @ $12.25 PER TON	$129,573.66
DECEMBER OVERBURDEN REMOVAL (includes survey drilling)	159,080.00
JANUARY FORKLIFT RENTAL	1,200 00
NOVEMBER/DECEMBER DIESEL FUEL USAGE: 5904 gal @$1.[illegible]	(6,075.21)
NOVEMBER/DECEMBER GAS USAGE. 2845.2 gal @$1.219	(3,468 29)

NOTE. SEND PAYMENT TO - ARNE'S AMERICA, INC.
PO BOX 9223
SALT LAKE CITY, UTAH 84109

SUBTOTAL	$280,310.16
EXCISE TAX Federal	
State / Provincial	
ADVERTISING FUND	
FREIGHT	
MISCELLANEOUS	
TOTAL	$280,310.16
LESS	
[illegible] Salvage Adjustment (if any)	
Government Price Protection	
Pre-Paid Deposit	
BALANCE DUE	$280,310.16

TYPE OF PAYMENT	FINANCE SOURCE	ACCOUNT NUMBER
☒ Draft	DEMIRO & TLORNL	YMM-100

TYPE OF PAYMENT	PLANT OF MANUFACTURE
☐ Bank Draft ☐ Bank Wire ☐ Cash	N/A

E

ARNE'S AMERICA INC.

P O Box 9223, Salt Lake City, Utah, 84109

INVOICE NUMBER	DATE	TYPE OF INVOICE	
AA10360	12-26-85	☐ Product ■ Part	☐ Service ☐ Publication

MODEL / PART / PUBLICATION NO	VEHICLE IDENTIFICATION NUMBER	PROD /DEL. DATE
N/A	N/A	VARIOUS

QUANTITY	TYPE OF ORDER	SALES CODE
SEE BELOW	■ Retail ☐ Stock ☐ Government ☐ Fleet	N/A

DEALER/CUSTOMER	DEALER /CUSTOMER ADDRESS
VICTORIA MINE AND MILLING	405 E. 100 SO. PLEASANT GROVE, UT.

DELIVERY ADDRESS (IF DIFFERENT FROM DEALER)	PARTS CODE
VICTORIA MINE, NV.	N/A

GRADER PARTS	$ 265.62
5 GAL. 85/44 OIL	22.43

NOTE: SEND PAYMENT TO - ARNE'S AMERICA, INC.
PO BOX 9223
SALT LAKE CITY, UTAH 84109

SUBTOTAL	$ 288.05
EXCISE TAX Federal	
State / Provincial	
ADVERTISING FUND	
FREIGHT	
MISCELLANEOUS	
TOTAL	$ 288.05
LESS	
Industry Equivalency Adjustment (IEA)	
Government Price Concession	
Pre-Paid Deposit	
BALANCE DUE	$ 288.05

TYPE OF PAYMENT	FINANCE SOURCE	ACCOUNT NUMBER
■ Check ☐ Draft	DE NIRO & THORNE	VMM-100

TERMS OF PAYMENT	PLANT OF MANUFACTURE
■ Due on delivery ☐ Net Plus _____ Days	N/A

F

ARNE'S AMERICA INC

P.O. Box 9223, Salt Lake City, Utah, 84109

ORDER NUMBER	DATE	TYPE OF INVOICE	SHIPPING PUBLICATION
AA 10559	12-18-85	■ Product ☐ Parts	☐

MODEL PART PUBLICATION NO	VEHICLE IDENTIFICATION NUMBER	PROP FUEL DATE
N/A	N/A	12-15-85

QUANTITY	TYPE OF ORDER	SALES CODE
SEE BELOW	■ Retail ☐ Stock ☐ Government ☐ Fleet	N/A

DEALER/CUSTOMER	DEALER/CUSTOMER ADDRESS
VICTORIA MINING AND MILLING	405 E 100 S, PLEASANT GROVE, UTAH

DELIVERY ADDRESS (IF DIFFERENT FROM DEALER)	PARTS CODE
VICTORIA MINE, NEVADA	N/A

2500 GALLONS #2 DIESEL FUEL (WINTERIZED) @ $1.149	$ 2872.50

NOTE: SEND PAYMENT TO - ARNE'S AMERICA, INC.
PO BOX 9223
SALT LAKE CITY, UTAH 84109

SUBTOTAL	$ 2872.50
EXCISE TAX Federal	
State / Provincial	
ADVERTISING FUND	
FREIGHT	
MISCELLANEOUS	
TOTAL	$ 2872.50
LESS Industry Equivalency Adjustment (IEA)	
Government Price Concession	
Pre-Paid Deposit	
BALANCE DUE	$ 2872.50

TYPE OF PAYMENT	FINANCE SOURCE	ACCOUNT NUMBER
■ Check ☐ Draft	DENIRO & THORNE	YM01-100

TERMS OF PAYMENT	PLANT OF MANUFACTURE
■ Due upon delivery ☐ Net Due _____ Date	N/A

G

ARNE'S AMERICA INC.

P.O. Box 9223, Salt Lake City, Utah, 84109

PROFORMA NUMBER: AA 10358	DATE: 12-18-85	TYPE OF INVOICE: ☒ Product ☐ Part	☐ Service ☐ Publication
MODEL / PART / PUBLICATION NO.: SEE BELOW	VEHICLE IDENTIFICATION NUMBER: N/A	PROD./DEL. DATE:	
QUANTITY: SEE BELOW	TYPE OF ORDER: ☒ Retail ☐ Stock ☐ Government ☐ Fleet	SALES CODE:	
DEALER/CUSTOMER: VICTORIA MINING AND MILLING	DEALER/CUSTOMER ADDRESS: 233 E 3900 S, SLC, UTAH		
DELIVERY ADDRESS (IF DIFFERENT FROM DEALER): VICTORIA MINE, CURRIE, NV		PARTS CODE: N/A	

NOVEMBER TONNAGE: 3892.25 @ $12.25 per ton	$108,330.06
ADJUSTED TONNAGE FROM OCTOBER: 667.5 @ $12.25 per ton	8,176.88
OVERBURDEN REMOVAL FOR NOVEMBER 11 THRU 30	85,830.00
ARNE'S PO #060 for 100' of chain for Victoria	43.31
DECEMBER RENTAL FOR FORKLIFT	1,200.00
NOTE: THIS INVOICE CORRECTS INVOICE DATED 11-12-85 (ISSUED IN ERROR)	
NOTE: SEND PAYMENT TO - ARNE'S AMERICA, INC.	
PO BOX 9223	
SALT LAKE CITY, UTAH 84109	
SUBTOTAL	$204,180.24
EXCISE TAX: Federal	
State / Provincial	
ADVERTISING FUND	
FREIGHT	
MISCELLANEOUS	
TOTAL	$204,180.24
LESS: Industry Equivalency Adjustment (IEA)	
Government Price Concession	
Pre-Paid Deposit	
BALANCE DUE	$204,180.24

TYPE OF PAYMENT: ☒ Check ☐ Draft	FINANCE SOURCE: DEMIRO & THORME	ACCOUNT NUMBER: VMM-100
TERMS OF PAYMENT: ☒ Due on Delivery ☐ Net Plus _____ Days	PLANT OF MANUFACTURE: N/A	

ARNE'S
AMERICA INC.

H

P O Box 9223, Salt Lake City, Utah, 84109

INVOICE NUMBER	DATE	TYPE OF INVOICE	
AA10357	12-5-85	■ Product ☐ Part	☐ Service ☐ Publication

MODEL / PART / PUBLICATION NO.	VEHICLE IDENTIFICATION NUMBER	PROD./DEL. DATE:
N/A	N/A	N/A

QUANTITY	TYPE OF ORDER	SALES CODE
SEE ATTACHED	■ Retail ☐ Stock ☐ Government ☐ Fleet	N/A

DEALER/CUSTOMER	DEALER/CUSTOMER ADDRESS
VICTORIA MINING AND MILLING	BILL: D & T; 233 E 3900 SO. SLC, UT.

DELIVERY ADDRESS (IF DIFFERENT FROM DEALER)	PARTS CODE
VICTORIA MINE; CURRIE, NV.	N/A

BILLING FOR ATTACHED PURCHASE ORDERS PAID FOR BY ARNE'S AMERICA INC.....	$3686.09
NOTE: SEND PAYMENT TO - ARNE'S AMERICA, INC. PO BOX 9223 SALT LAKE CITY, UTAH 84109	
SUBTOTAL	$3686.09
EXCISE TAX Federal State / Provincial	
ADVERTISING FUND	
FREIGHT	
MISCELLANEOUS	
TOTAL	$3686.09
LESS Industry Equivalency Adjustment (IEA) Government Price Concession Pre-Paid Deposit	
BALANCE DUE	$3686.09

TYPE OF PAYMENT	FINANCE SOURCE	ACCOUNT NUMBER
■ Check ☐ Draft	DE NIRO & THORNE	VMM-100

TERMS OF PAYMENT	PLANT OF MANUFACTURE
■ Due on delivery ☐ Net Plus _____ Days	N/A

ARNE'S AMERICA INC

T

P O Box 9223, Salt Lake City, Utah, 84109

INVOICE NUMBER	DATE	TYPE OF INVOICE	
AA10356	11-29-85	☐ Product ☐ Part	■ Service ☐ Publication

MODEL / PART / PUBLICATION NO	VEHICLE IDENTIFICATION NUMBER	PROD /DEL DATE.
N/A	N/A	11-23-85

QUANTITY	TYPE OF ORDER	SALES CODE
SEE BELOW	■ Retail ☐ Stock ☐ Government ☐ Fleet	N/A

DEALER/CUSTOMER	DEALER /CUSTOMER ADDRESS
VICTORIA MINING AND MILLING	bill to: D&T, 233 E. 3900 S., SLC, UT.

DELIVERY ADDRESS (IF DIFFERENT FROM DEALER)	PARTS CODE
VICTORIA MINE; CURRIE, NV.	N/A

2505 GAL. DIESEL FUEL @ 1.029 PER GALLLON (DELIVERED ON 11-23-85).....	$2577.65
DELIVERY OF STEEL, BARRELS, INSULATION, MISC. EQUIPMENT FROM BAILEY RIGGING.....	650.00
CONCENTRATE HAULS AT $2.00 PER LOADED MILE (773MILES):	
11-24-85.....	1546.00
11-28-85.....	1546.00

NOTE: SEND PAYMENT TO - ARNE'S AMERICA,INC.
PO BOX 9223
SALT LAKE CITY, UTAH 84109

SUBTOTAL	$6319.65
EXCISE TAX Federal	
State / Provincial	
ADVERTISING FUND	
FREIGHT	
MISCELLANEOUS	
TOTAL	$6319.65
LESS	
Industry Equivalency Adjustment (IEA)	
Government Price Concession	
Pre-Paid Deposit	
BALANCE DUE	$6319.65

TYPE OF PAYMENT	FINANCE SOURCE	ACCOUNT NUMBER
■ Check ☐ Draft	DeNIRO & THORNE	VMM-100

TERMS OF PAYMENT	PLANT OF MANUFACTURE
■ Due on delivery ☐ Net Plus_____ Days	N/A

D22

DEFENDANT'S EXHIBIT 22

ARNE'S AMERICA INC.

P. O. Box 9223, Salt Lake City, Utah, 84109

INVOICE NUMBER	DATE	TYPE OF INVOICE
AA10349	11-3-85	☐ Product ☐ Part ■ Service ☐ Publication

MODEL / PART / PUBLICATION NO.	VEHICLE IDENTIFICATION NUMBER	PROD /DEL. DATE:
N/A	N/A	N/A

QUANTITY	TYPE OF ORDER	SALES CODE
SEE BELOW	☐ Retail ☐ Stock ☐ Government ☐ Fleet	N/A

DEALER/CUSTOMER	DEALER /CUSTOMER ADDRESS
VICTORIA MINING AND MILLING	1761S. 900 W. SLC, UT.

DELIVERY ADDRESS (IF DIFFERENT FROM DEALER)	PARTS CODE
VICTORIA MINE, NV.	N/A

REMOVABLE OF OVERBURDEN AT VICTORIA MINE, NV.	$ 81,420.00
HAULING OF 5 STEEL BEAMS TO VMM SITE IN NEVADA	390.00
165 GALS. OF 15-40 CHEVRON OIL	804.37
165 GALS. OF 300-10 CHEVRON	769.72
165 GALS. OF 400-10 CHEVRON	816.75
400 LBS. OF GEAR GREASE	324.60
3 DRUMS	210.00

BILLED TO: DENIRO & THORNE
233 E. 3900 SO.
SLC, UT.

PAYABLE UPON RECEIPT OF THIS INVOICE.

NOTE: SEND PAYMENT TO - ARNE'S AMERICA, INC.
PO BOX 9223
SALT LAKE CITY, UTAH 84109

SUBTOTAL	$ 84,735.44
EXCISE TAX Federal	
State / Provincial	
ADVERTISING FUND	
FREIGHT	
MISCELLANEOUS TAX ON OIL PRODUCTS	$ 168.21
TOTAL	$ 84,903.65
LESS	
Industry Equivalency Adjustment (IEA)	
Government Price Concession	
Pre-Paid Deposit	
BALANCE DUE	$ 84,903.65

Part Pd by agreement dated 10/14/85 balance owing $76,423.65 Paid $40,323.42 balance owing $36,100.23 11/22/85

TYPE OF PAYMENT	FINANCE SOURCE	ACCOUNT NUMBER
☐ Check ☐ Draft		

TERMS OF PAYMENT	PLANT OF MANUFACTURE
■ Due on delivery ☐ Net Plus _____ Days	

D23

DEFENDANT'S EXHIBIT 23

ARNE'S AMERICA INC

P O Box 9223, Salt Lake City, Utah, 84109

INVOICE NUMBER: AA10346	DATE: October 18, 85	TYPE OF INVOICE: ☐ Product ☐ Part ■ Service ☐ Publication	
MODEL / PART / PUBLICATION NO	VEHICLE IDENTIFICATION NUMBER	PROD /DEL. DATE: 10/3-15/85	
QUANTITY: See Below	TYPE OF ORDER: ☐ Retail ☐ Stock ☐ Government ☐ Fleet	SALES CODE	
DEALER/CUSTOMER: VICTORIA MINING AND MILLING	DEALER /CUSTOMER ADDRESS: 1761 S 900 W, SLC, UTAH, 84104		
DELIVERY ADDRESS (IF DIFFERENT FROM DEALER): VICTORIA MINE, NEVADA	PARTS CODE		

REMOVAL OF 28,000 YARDS OF PREVIOUSLY BLASTED OVERBURDEN AT $2.10/YARD	$58,800.00
REMOVAL OF OVERBURDEN AT AN HOURLY RATE AS ESTABLISHED IN AGREEMENT DATED OCTOBER 17, 1985, PREPARED FOR SIGNATURE.	42,720.00
NOTE: SEND PAYMENT TO - ARNE'S AMERICA, INC. PO BOX 9223 SALT LAKE CITY, UTAH 84109	
SUBTOTAL	$101,520.00
EXCISE TAX Federal State / Provincial	
ADVERTISING FUND	
FREIGHT	
MISCELLANEOUS	
TOTAL	$101,520.00
LESS Industry Equivalency Adjustment (IEA) Government Price Concession Pre-Paid Deposit	
BALANCE DUE	$101,520.00

TYPE OF PAYMENT: ■ Check ☐ Draft	FINANCE SOURCE	ACCOUNT NUMBER: VMM 100
TERMS OF PAYMENT: ☐ Due on delivery ■ Net Plus 15 Days	PLANT OF MANUFACTURE	

Tab L

INVOICE NUMBER	DATE	DESCRIPTION		PAID BY	BALANCE DUE	REMARKS
AA10038	9/26/85	Fuel	$ 4156.00	Fuel Credit of 11/22/85		
AA10338	9/9/85	Labor/Freight	1781.00	Advance 11/14 $1555.42		Balance Paid with Fuel Credit 11/22
AA10339	9/9/85	Forklift Rental	1338.00		$ 1338.00	Includes Tax/Sept
AA10340	9/13/85	Fuel	11315.85	Paid Ck#201 of 10/31/85	5186.35	
AA10341	9/30/85	Fuel	9870.00	Fuel Credit of 11/22/85		
AA10342	10/2/85	Fuel	7792.50	Paid Ck#201 of 10/31/85		
AA10343	10/3/85	Freight/Forklift Rental	1544.00	Paid Ck#201 of 10/31/85		October Rent
AA10344	10/3/85	September Tonnage	150205.82	Paid by Agreement of 10/14		
AA10345	10/19/85	Fuel	5485.00	Paid Ck#201 of 10/31 ($4534)		Balance Paid with 11/14 Advance
AA10346	10/18/85	Blasting/Overburden	101520.00	Paid by Agreement of 10/14		
AA10347	11/2/85	Fuel/POL	4316.55	Advance 11/14		
AA10348	11/2/85	Parts/Airfare/Fuel	6736.53	Advance 11/14		
AA10349	11/3/85	Overburden/Freight/POL	84903.65 $1,42-.0[illegible]	Paid by Agreement of 10/14 ($48480.00)	23335.00	Balance Paid with Fuel Credit 11/22 ($ 13088.65)
AA10350	11/14/85	Labor/Forklift/Tonnage	156181.20	Paid by RIHT		
AA10352	11/16/85	Parts	1574.10	Paid Ck#1083		
AA10353	8/27/85	Freight	600.00	Advance 11/14		
AA10354	11/21/85	Fuel/Freight	10549.70	Paid Ck#		
AA10355	11/22/85	Overburden	60840.00	Advance 11/14		
AA10356	11/29/85	Fuel/Freight	6319.65		6319.65	
AA10357	12/5/85	Parts	3686.00		3686.00	
AA10358	12/18/85	Tonnage/Overburden/ PO#060; Chain/Forklift	204180.24	$5,83[illegible].00	204180.24	December Rental
AA10359	12/18/85	Fuel	2872.50		2872.50	
AA10360	12/26/85	Parts/POL	288.05		288.05	
AA10361	1/2/86	Tonnage/Overburden/ Forklift	280310.16 205496.16	144,266.00 473,876.00	280310.16	January Rental
AA10363	2/3/86(2/19/86)	January Stand-By	84221.00		84221.00	Cost Basis Only
AA10364	2/19/86	Parts/POL	1263.91		1263.91	
TOTALS			1187056.50 $1203851.30	$590850.44	3751[illegible]6.36 $613000.86	

PLAINTIFF'S EXHIBIT 31 91090 7995
PENGAD-Bayonne, N. J.